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In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN, and its Trustees; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, and its Trustees,
Petitioners,

v.

LECKIE SMOKELESS COAL COMPANY, *et al.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701 *et seq.*, Congress determined that each employer that voluntarily participated in the collectively bargained multiemployer health care system for active and retired miners in the coal industry and whose former employees were still receiving benefits from that system, should, beginning on February 1, 1993, pay the future health care costs of the retired employees and dependents assigned or attributable to that employer under the criteria set forth in the statute.

The questions presented are:

1. Whether all tax liability that otherwise might be imposed in the future under the Coal Act constitutes a single pre-petition claim against a debtor under the Bankruptcy Code.

2. Whether, under the Bankruptcy Code, a court has jurisdiction to enter a declaratory judgment absolving a nondebtor, who has not filed a petition for bankruptcy relief, from all tax liability that otherwise might be imposed in the future under the Coal Act.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties in the court of appeals: New River Mineral Resources Company; Gould Resources, Incorporated; Royal Scot Minerals, Incorporated; Lady H Coal Company, Incorporated; Consolidated Sewell, Incorporated; Sewell Coal Company; Leivasy Mining Corporation; and Eastwood Construction, Incorporated. The court of appeals listed the Unsecured Creditors Committee, the United States Trustee, the International Union, United Mine Workers of America, and United Mine Workers of America, District 17 as parties-in-interest, but none of those entities filed briefs or otherwise participated in the court of appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Factual Background	4
B. Proceedings in the District Court	13
C. The Decision of the Court of Appeals	15
REASONS FOR GRANTING THE PETITION	17
I. THE COURT OF APPEALS' DECISION CONFLICTS WITH PRIOR LAW THAT HAS TREATED FUTURE TAXES AND PRE-PETITION BANKRUPTCY CLAIMS AS MUTUALLY EXCLUSIVE CATEGORIES UNDER THE BANKRUPTCY CODE	20
II. THE COURT OF APPEALS' HOLDING THAT THE LOWER COURTS HAD JURISDICTION TO ABSOLVE NONDEBTOR THIRD PARTIES FROM FUTURE COAL ACT TAXES CONFLICTS WITH THE BANKRUPTCY CODE AND PRIOR DECISIONS	27
CONCLUSION	30

TABLE OF CONTENTS—Continued

APPENDIX A — Page

Lady H Coal Co. v. United Mine Workers of America 1992 Benefit Plan, 99 F.3d 573 (4th Cir. 1996) 1a

APPENDIX B

UMWA 1992 Benefit Plan v. Leckie Smokless Coal Co., 201 B.R. 163 (S.D. W. Va. 1996) 30a

APPENDIX C

In re Lady H Coal Co., 199 B.R. 595 (S.D. W. Va. 1996) 53a

APPENDIX D

In re Lady H Coal Co., 193 B.R. 233 (Bankr. 1996) 57a

APPENDIX E

Order on Petition for Rehearing with Suggestion for Rehearing *In Banc* 87a

APPENDIX F

Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* and Bankruptcy Code Provisions 91a

APPENDIX G

Coal Commission Report: A Report to the Secretary of Labor and the American People (November 1990) (excerpts) 141a

TABLE OF AUTHORITIES

CASES — Page

Adventure Resources, Inc. v. Holland, 193 B.R. 787 (S.D. W. Va. 1996) 10
A1 Tech Speciality Steel Corp. v. Allegheny Int'l, Inc. (In re Allegheny Int'l, Inc.), 126 B.R. 919 (Bankr. W.D. Pa.), *aff'd*, 950 F.2d 721 (3d Cir. 1991) 24
American Bicycle Ass'n v. United States (In re American Bicycle Ass'n), 895 F.2d 1277 (9th Cir. 1990) 29
American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.), 885 F.2d 621 (9th Cir. 1989) 28
Barrick Gold Exploration, Inc. v. Hudson, 823 F. Supp. 1395 (S.D. Ohio 1993), *aff'd*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S. Ct. 64 (1995) 4
Blue Diamond Coal Co. v. Secretary of Health and Human Servs. (In re Blue Diamond Coal Co.), 79 F.3d 516 (6th Cir. 1996), *cert. denied*, No. 431 (January 6, 1997) 4
Brandt-Airflex Corp. v. Long Island Trust Co. (In re Brandt-Airflex Corp.), 843 F.2d 90 (2d Cir. 1988) 27, 28, 29
Burns v. City of Winston-Salem (In re Members Warehouse, Inc.), 991 F.2d 116 (4th Cir. 1993) .. 22
Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir. 1996) 4
Commissioner v. Sunnen, 333 U.S. 591 (1948) 21
Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996) 4
Holland v. Keenan Trucking, Inc., 1996 WL 721880 (4th Cir. Dec. 17, 1996) 4
In re Blue Coal Corp., 166 B.R. 816 (Bankr. M.D. Pa. 1993) 22
In re Piper Aircraft Corp., 162 B.R. 619 (Bankr. S.D. Fla.), *aff'd*, 168 B.R. 434 (S.D. Fla. 1994), *aff'd sub. nom. Epstein v. Official Committee of Unsecured Creditors*, 58 F.3d 1573 (11th Cir. 1995) 24

TABLE OF AUTHORITIES—Continued

Page

Johnson v. Home State Bank, 501 U.S. 78 (1991).. 24
LTV Steel Co., Inc. v. Shalala (In re Chateaugay Corp.), 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995) ..... *passim*
LaSalle Rolling Mills, Inc. v. IRS (In re LaSalle Rolling Mills, Inc.), 832 F.2d 390 (7th Cir. 1987) 29
Laughlin v. IRS, 912 F.2d 197 (8th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991) 29
Lindsey Coal Mining Co. Liquidating Trust v. Chater, 90 F.3d 688 (3d Cir. 1996) 4
Maryland Nat'l Bank v. Mayor and City Council of Baltimore, 723 F.2d 1138 (4th Cir. 1983)..... 21
Michigan Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.), 930 F.2d 1132 (6th Cir. 1991), *cert. dismissed*, 503 U.S. 978 (1992) 29
Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439 (6th Cir. 1993) 28
New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund, 886 F.2d 714 (4th Cir. 1989) 20
Quattrone Accountants, Inc. v. IRS, 895 F.2d 921 (3d Cir. 1990) 29
River Place East Housing Corp. v. Rosenfeld (In re Rosenfeld), 23 F.3d 833 (4th Cir.), *cert. denied*, 115 S. Ct. 200 (1994) 24
South Carolina v. Regan, 465 U.S. 367 (1984).... 29
Teamsters Joint Council No. 83 v. CenTra, Inc., 947 F.2d 115 (4th Cir. 1991) 28
Towers v. United States (In re Pacific-Atlantic Trading Co.), 64 F.3d 1292 (9th Cir. 1995)..... 22
United States v. Flo-Lizer, Inc. (In re Flo-Lizer, Inc.), 916 F.2d 363 (6th Cir. 1990)..... 20
United States v. Friendship College, Inc. (In re Friendship College, Inc.), 737 F.2d 430 (4th Cir. 1984) 22
United States v. Huckabee Automobile Co., 783 F.2d 1546 (11th Cir. 1986) 27, 28, 29

TABLE OF AUTHORITIES—Continued

	Page
United States v. Noland, 116 S. Ct. 1524 (1996)	23
United States v. Reorganized CF & I Fabricators of Utah, Inc., 116 S. Ct. 2106 (1996)	21
United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989)	23
United States v. Union Scrap Iron & Metal, 123 B.R. 831 (D. Minn. 1990)	24
West Virginia State Dep't of Tax & Revenue v. IRS (In re Columbia Gas Transmission Corp.), 37 F.3d 982 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995)	22
Westmoreland Coal Co., 96-26092 (Bankr. D. Colo. Dec. 23, 1996)	19-20
Westmoreland Coal Sales Co., 96-26095 (Bankr. D. Colo. Dec. 23, 196)	20
Westmoreland Energy Co., 96-26094 (Bankr. D. Colo. Dec. 23, 1996)	20
Westmoreland Resources, Inc., 96-26096 (Bankr. D. Colo. Dec. 23, 1996)	20
Westmoreland Terminal Co., 96-26093 (Bankr. D. Colo. Dec. 23, 1996)	20
Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159 (7th Cir. 1994)	23

STATUTORY PROVISIONS

11 U.S.C. § 363(f)	13, 14, 15, 16, 25
11 U.S.C. § 503(b)(1)(B)	21, 26
11 U.S.C. § 505(a)	27, 28
11 U.S.C. § 507(a)(1)	21
11 U.S.C. § 507(a)(8)	21
11 U.S.C. § 524(e)	28
11 U.S.C. § 1141(d)	21
Anti-Injunction Act, 26 U.S.C. § 7421	16, 27, 29
Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*	*passim*
26 U.S.C. § 9701 (historical note)	9, 10
26 U.S.C. § 9701	12, 13
26 U.S.C. § 9702	10
26 U.S.C. § 9703	10

TABLE OF AUTHORITIES—Continued

	Page
26 U.S.C. § 9704	11, 12
26 U.S.C. § 9706	11, 12
26 U.S.C. § 9711	10, 12, 13
26 U.S.C. § 9712	10, 11, 12
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292(b)	15
Declaratory Judgment Act, 28 U.S.C. § 2201	16, 27, 29
Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*	5
Social Security Independence and Program Improvement Act of 1994, Pub. L. No. 103-296, §§ 105(a)(1), (2)(A); 108(h)(9)(A), (B); 110(a), 108 Stat. 1472-73, 1487-88	11
MISCELLANEOUS	
Coal Commission Report: A Report to the Secretary of Labor and the American People (November 1990)	*passim*
26 C.F.R. § 1.1503-2(c)(12)	14
136 Cong. Rec. S12312 (daily ed. Oct. 2, 1989)	7
Executive Order No. 9728 (May 21, 1946)	5
H.R. Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963	21
Program Operations Manual System, Transmittal No. 9, SSA Pub. No. 68-0101402 (January 1994)	13
S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787	21, 27

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PETITION FOR A WRIT OF CERTIORARI

The United Mine Workers of America 1992 Benefit Plan and its Trustees, and the United States of America Mine Workers Combined Benefit Fund and its Trustees, by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of the appeals (App. A, 1a-29a) is reported at 99 F.3d 573. The opinion of the district court in *Leckie* is reported at 201 B.R. 163 (App. B, 30a-52a). The opinion of the district court in *Lady H* is reported at 199 B.R. 595 (App. C, 53a-56a). The opinion of the bankruptcy court in *Lady H* is reported at 193 B.R. 233 (App. D, 57a-86a).

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1996. A petition for rehearing was denied on December 30, 1996. App. E, 87a-90a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Coal Industry Retiree Health Benefit Act of 1992, which was enacted as part of the Energy Policy Act of 1992, Pub. L. No. 102-456, 106 Stat. 2776, 3036-3056, and which is codified in the Internal Revenue Code, 26 U.S.C. §§ 9701-9722, and in amendments to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1232(h), is reproduced in its entirety in Appendix F, 91a-127a. The principal relevant sections of the Bankruptcy Code, Sections 363, 503(b), 505(a), 507, and 524(e), also are reproduced in Appendix F, 128a-140a.

STATEMENT OF THE CASE

The Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") established a statutory system for providing retiree health benefits to more than 100,000 retired coal miners and their survivors and dependents. The statute created two new trust funds, the United Mine Workers of America Combined Benefit Fund (the "Combined Fund") and the United Mine Workers of America 1992 Benefit Plan (the "1992 Plan") and directed that current and former coal operators pay periodic premiums to help finance the benefits provided by these funds.

This case presents important issues regarding the proper treatment of Coal Act obligations in bankruptcy. The court of appeals' decision, if left undisturbed, will jeopardize the long-term ability of the Trustees of the Combined Fund and the 1992 Plan to pay for the health care benefits mandated by the statute and will threaten to recreate the very problems that the Coal Act was designed to solve.

Although the court of appeals correctly concluded that Coal Act obligations are taxes, the court failed to treat those tax obligations in the manner that taxes must be treated under the Bankruptcy Code. Instead of recognizing that, under the Bankruptcy Code, future taxes cannot be treated as "claims" that can be accelerated and discharged in bankruptcy, the court held that all Coal Act taxes that otherwise might be imposed in the future against a nondebtor third party may be accelerated into a single pre-petition "claim" that can be eliminated in bankruptcy. The court of appeals' decision is at odds with prior law that has treated future taxes and pre-petition bankruptcy "claims" as mutually exclusive categories entitled to different treatment under the Bankruptcy Code.

In addition to failing to acknowledge the proper treatment of taxes under the Bankruptcy Code, the court of appeals improperly decided that, under the Bankruptcy Code, a court can render a declaratory judgment absolving a nondebtor third party from Coal Act tax liability. The court of appeals' decision is contrary not only to the Bankruptcy Code, but also to decisions of other federal courts of appeals, which have held that federal courts in bankruptcy matters have no jurisdiction to determine the tax liability of any party other than the bankrupt debtor.

The court of appeals' error is particularly significant because it establishes a blueprint for coal operators to use bankruptcy to avoid their Coal Act obligations. Coal operators in growing numbers are filing for bankruptcy, seeking to avoid their future liabilities under the Act as part of their bankruptcies. More than thirty-four such bankruptcy cases have been pending at various times since the enactment of the Coal Act. These cases involve more than 3,900 beneficiaries of the 1992 Plan, and more than 6,200 beneficiaries of the Combined Fund. The projected future health care costs for such a large number of beneficiaries total more than $500 million. Review by this Court is needed urgently to establish that future tax obligations under the Coal Act cannot be eliminated in bank-

ruptcy and to prevent a return to the financial crisis that the Coal Act was designed to resolve.

A. Factual Background

To understand the present dispute and the significance of the issues presented, familiarity with the background of the Coal Act, the problems confronted by Congress, and the nature of the legislative solution is essential. In that connection, we respectfully refer the Court to the Report of the Coal Commission appointed by Secretary of Labor Dole and to the numerous appellate decisions sustaining the validity of the Coal Act against constitutional attack.[1] We summarize here only the most salient features of the story.

For fifty years, the issue of health care for tens of thousands of retired coal miners and their survivors and dependents has been a matter of national importance. Few, if any, issues have been more critical to coal miners, and, as a result, health care has been at the center of labor disputes in the coal producing regions of the nation. Because coal mining has played a central role in the economies of a number of coal producing states, the federal government has taken a direct interest in the uninterrupted provision of health care to retired miners. Indeed, the multiemployer system for delivery of health care to active and retired employees in the coal industry was created not by coal companies but by the federal govern-

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[1] *Coal Commission Report: A Report to the Secretary of Labor and the American People* (Nov. 1990) (relevant portions reproduced in Appendix G, 141a-190a); *Holland v. Keenan Trucking, Inc.*, 1996 WL 721880 (4th Cir. Dec. 17, 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1137-39 (4th Cir. 1996); *Lindsey Coal Mining Co. Liquidating Trust v. Chater*, 90 F.3d 688 (3d Cir. 1996); *Blue Diamond Coal Co. v. Secretary of Health and Human Servs. (In re Blue Diamond Coal Co.)*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, No. 96-431 (Jan. 6, 1997); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995); *Barrick Gold Exploration Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S. Ct. 64 (1995).

ment itself, in an historic collective bargaining agreement negotiated between the government and the United Mine Workers of America ("UMWA").

In 1946, the UMWA proposed the creation of a health and welfare fund for active and retired miners. Employers resisted, and a bitter national strike ensued. To end the seven-week strike and avoid further economic disruption, President Truman issued Executive Order No. 9728 (May 21, 1946), directing Secretary of the Interior Julius Krug to seize the nation's coal mines and authorizing the Secretary to negotiate a new collective bargaining agreement with the UMWA. App. 156a. The resulting Krug-Lewis Agreement provided for the creation of two separate multiemployer funds to provide welfare and retirement benefits and medical and hospital benefits to active and retired miners and their survivors and dependents.

The following year, after the federal government had returned the mines to private control, the UMWA and coal operators negotiated a new National Bituminous Coal Wage Agreement ("NBCWA"), which merged the two Krug-Lewis funds into a single multiemployer health and welfare fund. Thereafter, the UMWA and coal operators negotiated the 1950 NBCWA, which created the 1950 UMWA Welfare and Retirement Fund ("1950 W&R Fund"), a single industry-wide collectively bargained fund to provide health benefits for active and retired miners and their survivors and dependents, and also to provide retirement benefits to retirees. In subsequent years, the UMWA and the Bituminous Coal Operators' Association, Inc. ("BCOA"), a multiemployer bargaining association formed to conduct negotiations on behalf of the coal operators, negotiated several amendments to the 1950 NBCWA and several successor NBCWAs, all of which provided for continuing health benefits.

In the 1974 NBCWA, partly in response to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, the UMWA and BCOA divided

the 1950 W&R Fund into four separate trusts, two for pension benefits and two for health benefits. The two health benefit trusts were the UMWA 1950 Benefit Plan and Trust ("1950 Benefit Trust"), which provided health benefits to UMWA miners who retired before 1976, and the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Trust"), which provided health benefits for miners who retired in 1976 or thereafter as well as for the active work force. Like the 1950 W&R Fund, the 1950 and 1974 Benefit Trusts were multiemployer trust funds financed by NBCWA signatory coal companies.

In 1978, the UMWA and BCOA restructured the 1974 Benefit Trust to address employer concerns that the multiemployer approach to retiree health care was unraveling as fewer companies elected to participate in the multiemployer plans and an increasing burden was placed on a shrinking group of signatory operators. As fewer and fewer mine operators signed the NBCWAs, more and more retirees receiving benefits from the multiemployer plans were so-called "orphan" retirees, whose last coal industry employers had gone out of business or otherwise ceased contributing to the Trusts. By definition, such orphan retirees received health benefits financed entirely by companies other than their former employers. To attempt to deal with this situation while at the same time recognizing the longstanding historical practice in the industry, the 1978 NBCWA continued the multiemployer approach for providing health benefits to persons who retired before January 1, 1976, but provided that persons who retired on or after that date generally would receive their health benefits from single employer plans maintained by the retirees' former employers. The 1974 Benefit Trust was retained to provide health benefits on a multiemployer basis to those persons who retired on or after January 1, 1976, but whose former employers were no longer in business.

During the 1980s, the problems that led to the 1978 restructuring of the collectively bargained multiemployer

benefit plans became more acute, and threatened the 1950 and 1974 Benefit Trusts' ability to continue providing health benefits to their beneficiaries. App. 6a ("the number of employers contributing to the plans declined, the number of orphaned miners increased, and the costs of health care soared"). The uncertainty of continued health benefits for active and retired UMWA miners and their survivors and dependents led to substantial labor strife in the nation's bituminous coal mining regions and threatened the economies of several coal producing states.[2]

One of the most serious of these labor disputes was a ten-month strike by the UMWA against the Pittston Coal Company and related entities, in which the provision of health benefits was a major issue. When collective bargaining failed to resolve the dispute, Secretary of Labor Elizabeth Dole intervened and facilitated a settlement. As part of the settlement, the Secretary established a special bipartisan advisory commission called the Secretary's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"). The Secretary authorized the Coal Commission to analyze the retiree health care crisis and recommend a solution.

In its November 1990 Report, the Coal Commission stressed that ensuring the continued provision of health benefits to UMWA retirees and their survivors and dependents should be the primary objective of any proposed solution. "The Commission firmly believes that the retired miners are entitled to the health care benefits that were

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[2] *See, e.g.*, 136 Cong. Rec. S12312 (statement of Senator Rockefeller) (daily ed. Oct. 2, 1989) ("the [UMWA health] funds contribute many millions of dollars to the West Virginia economy and sustain the efforts of many health care practitioners and organizations. If allowed to continue unchecked, the financial difficulties in the UMWA health funds could cripple health care delivery in West Virginia and in coal counties of states like Alabama, Arkansas, Colorado, Illinois, Indiana, Kentucky, Ohio, Pennsylvania, and Virginia.").

promised and guaranteed to them and that such commitments must be honored." App. 146a.[3]

The Coal Commission identified three developments, the combination of which "has left the Funds, which were created to provide retired coal miners and their families with one of the finest health care programs in the nation, in financial crisis." App. 148a. First, the Coal Commission found that "the number of coal companies making contributions to the Funds has declined significantly." App. 148a; *see also* App. 179a ("some employers have sought to avoid, or are avoiding, their obligations to provide health care benefits to retirees and their families, foisting the cost of providing promised benefits on other employers.").[4] Second, the Commission recognized the dramatic increase in the cost of health care between 1950 and 1990, stating that "[i]n the past 10 years alone, the total cost of [annual] health care benefits paid by the Funds, has doubled from $117.4 million to $245.3 million." App. 148a. Finally, the Coal Commission noted the "steady increase in the number of orphaned retirees whose employers have either gone out of business or no longer provide health care benefits." App. 148a. In light of these facts, as well as its finding that the 1950 and 1974 Benefit Trusts' funding bases were declining faster than their beneficiary populations, the Coal Commission

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[3] Similarly, the Commission found that "[r]etired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored. But today those expectations and commitments are in jeopardy." App. 147a.

[4] The Coal Commission noted that, while companies contributing to the UMWA multiemployer health benefit plans in 1950 represented 80 percent of the coal produced in the nation, "by 1990, companies making contributions to the [UMWA Benefit Trusts] account[ed] for only 30 percent of national coal production." App. 148a.

predicted that the Benefit Trusts would have a combined estimated deficit of $300 million by 1993. App. 149a.

The Coal Commission, recognizing that the collective bargaining process was no longer capable of providing a long-term solution to the health care crisis, recommended two alternative statutory approaches. The Commission's first approach called for imposing an industry-wide tax on all coal operators to finance the health care of UMWA orphan retirees. App. 179a-183a. In the alternative, the Commission proposed that the responsibility for financing UMWA retiree health benefits be placed upon NBCWA signatory operators and their related business entities, specifically including their successors. App. 183a-187a. Congress ultimately adopted the second approach, which provided for the collection of "additional revenues from a broadened base of current and past signatories to the contracts, . . . [including] firms once signatory who can be identified through a chain of succession to a current operator." App. 183a-184a.

In October 1992, after extensive hearings on the health care crisis in the coal industry and consideration of the recommendations of the Coal Commission, Congress enacted the Coal Act as part of the Energy Policy Act of 1992, Pub. L. No. 102-456, 106 Stat. 2776, 3036-3056. In enacting the Coal Act, Congress found that

> it is necessary to modify the private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

106 Stat. 3037; *see* 26 U.S.C. § 9701 (historical note). Congress further stated that the policy of the Coal Act is

> to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry . . . [and] to provide for the continuation of a privately financed

> self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

106 Stat. 3037; *see* 26 U.S.C. § 9701 (historical note).

The Coal Act established two new trust funds, the Combined Fund and the 1992 Plan, for the provision of health care benefits to retired miners and their survivors and dependents. The Coal Act directed the UMWA and BCOA to cause the 1950 and 1974 Benefit Trusts to be merged into the Combined Fund. 26 U.S.C. § 9702 (a)(2). The Combined Fund is to provide benefits to coal industry retirees and their dependents who were eligible to receive, and were receiving, benefits from the 1950 or 1974 Benefit Trust as of July 20, 1992. 26 U.S.C. § 9703(a), (b)(1), (c), (e), (f). The Combined Fund thus has a closed class of beneficiaries, the membership of which will diminish over time.

The 1992 Plan is an entirely new entity that provides benefits to persons who are not eligible for the Combined Fund but who, based on their age and service earned as of February 1, 1993, would have been entitled to receive benefits from the 1950 or 1974 Benefit Trust, and who actually retired before October 1, 1994. 26 U.S.C. § 9712 (b)(2)(A). The 1992 Plan also provides benefits to those persons who retired before October 1, 1994, and who should be covered by individual employer plans under the Coal Act, but whose employers fail to provide such coverage. 26 U.S.C. §§ 9711(b), 9712(b)(2)(B).

Both the Combined Fund and the 1992 Fund are financed primarily through taxes or "premiums" that accrue periodically. These premiums are taxes because they are involuntary pecuniary burdens that serve the public purpose of funding retiree health benefits for miners and their survivors and dependents. *See* App. 21a; *LTV*, 53 F.3d at 498; *Adventure Resources, Inc. v. Holland*, 193 B.R. 787, 794 n.13 (S.D. W. Va. 1996). Congress directed that the principal operative provisions of the Coal Act be codified as part of the Internal Revenue Code. This provides further support for the characteriza-

tion of Coal Act premiums as taxes. *LTV*, 53 F.3d at 498.

In the case of the Combined Fund, an operator's annual premium depends on the number of Combined Fund beneficiaries assigned to the operator by the Social Security Administration ("SSA") under Section 9706 of the Coal Act, 26 U.S.C. § 9706, and on the annual per beneficiary premium computed each year by the SSA in accordance with the formula set forth in Section 9704(b)(2) of the Coal Act. 26 U.S.C. § 9704(b)(2).[5] An operator's annual health care premium for a given plan year is the product of the number of the operator's assigned beneficiaries at the begining of the year and the per beneficiary premium set for the year by the SSA.[6] The annual premium is payable in twelve equal monthly installments during the plan year. 26 U.S.C. § 9704(g)(1).

The 1992 Plan is funded through two kinds of periodic tax payments. The first kind of payment is a monthly per beneficiary premium. For each beneficiary receiving benefits from the 1992 Plan, the beneficiary's last signatory operator is obligated to make a monthly payment to finance that beneficiary's health care. 26 U.S.C. § 9712 (d)(1)(B), (3). The amount of the monthly payment is adjusted annually and is calculated to equal the cost to the 1992 Plan of providing benefits to a single beneficiary for a single month. 26 U.S.C. § 9712(d)(2)(A).

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[5] As of March 31, 1995, Congress transferred to the Commissioner of Social Security the responsibilities originally assigned to the Secretary of Health and Human Services under the Coal Act. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, §§ 105(a)(1), (2)(A); 108(h)(9)(A), (B); 110(a), 108 Stat. 1472-73, 1487-88. Accordingly, we refer in the text simply to the SSA.

[6] The number of assigned beneficiaries will change due to a variety of circumstances, including, among other things, the outcome of assignment appeals before the SSA, re-marriage of surviving spouses, children coming of age, and beneficiaries' deaths. The amount of the per beneficiary premium similarly will fluctuate, in light of changes in the cost of providing benefits.

The second kind of payment to the 1992 Plan is called an "annual pre-funding premium" and is intended to provide for those 1992 Plan beneficiaries whose last signatory operators are no longer in business or fail for some other reason to pay all or part of the required monthly per beneficiary premium. The annual pre-funding premium is designed to provide the 1992 Plan with sufficient assets to fund benefits for those beneficiaries (a substantial majority of the 1992 Plan's beneficiary population) for whom monthly per beneficiary premiums are not paid. 26 U.S.C. § 9712(a)(2)(B). The amount of the annual pre-funding premium is adjusted annually and is assessed against 1988 last signatory operators (as that term is defined in the Coal Act (*see* 26 U.S.C. §§ 9701(c)(3), (4), 9712(d)(6)) on the basis of (i) the number of their retirees currently receiving benefits from the 1992 Plan and (ii) the number of their retirees potentially eligible to receive benefits from the 1992 Plan. 26 U.S.C. § 9712(d)(1)(A). "Potentially eligible" beneficiaries are those who satisfy the 1992 Plan's eligibility criteria in terms of age, service, and retirement date but are currently receiving benefits from their last signatory operator's individual employer plan under Section 9711 of the Coal Act, 26 U.S.C. § 9711.

Congress had a strong desire to prevent the avoidance of Coal Act liabilities through manipulation of corporate transactions. Accordingly, the Coal Act provides that "related persons" are jointly and severally liable for the tax obligations of signatory operators. 26 U.S.C. §§ 9704 (a)(3), 9706(b)(2), 9711(c), (g)(2), 9712(d)(4). "Related persons" include members of a controlled group of corporations that includes a liable signatory operator, as well as trades or businesses that are under common control with such a signatory operator. 26 U.S.C. § 9701 (c)(2)(A).

Mindful of the crisis caused by coal operators going out of business and dumping their retirees on the dwindling number of remaining operators, Congress further defined "related persons" to include "successors in interest" to any

such persons. 26 U.S.C. § 9701(c)(2)(A). Similarly, Congress provided that the term "last signatory operator" includes a successor in interest to any such operator. 26 U.S.C. § 9711(g)(1). These provisions were designed to provide further assurance that a manipulation of corporate liabilities would not provide a means of escape from liability under the Act.[7]

B. Proceedings in the District Court

Respondents, the three *Leckie* entities[8] and the five *Lady H* entities,[9] are former coal mine operators that initiated separate proceedings under Chapter 11 of the Bankruptcy Code in the United States District Court for the Southern District of West Virginia. The *Leckie* respondents are responsible for 140 beneficiaries of the Combined Fund and 87 beneficiaries of the 1992. The *Lady H* respondents are responsible for 150 beneficiaries of the 1992 Plan.

As part of the separate bankruptcy proceedings, which were reviewed by different district judges in the same district court, respondents sought to sell substantially all of

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[7] The terms "successor" and "successor in interest" are not defined in the Coal Act. The SSA has stated, in its internal guidelines discussing assignment of Combined Fund beneficiaries under Section 9706 of the Act, that application of the terms depends on "the facts and surrounding circumstances." Program Operations Manual System, Transmittal No. 9, SSA Pub. No. 68-0101402 (January 1994). At minimum, petitioners submit, an entity that purchases substantially all of the assets of a signatory operator that is going out of business, and then uses those assets in a continuing business operation, ordinarily should be deemed a "successor" to the operator's Coal Act obligations, and should assume the operator's obligations to provide health benefits for the beneficiaries assigned to that operator.

[8] The three entities referred to collectively as the *Leckie* respondents are Leckie Smokeless Coal Company, the New River Mineral Resources Company, and Gould Resources, Inc.

[9] The five entities referred to collectively as the *Lady H* respondents are the Lady H Coal Company, Inc., Consolidated Sewell, Inc., Sewell Coal Company, Leivasy Mining Corporation, and Eastwood Construction, Inc.

their assets to unrelated third-party purchasers. In each case, respondents filed a motion under Section 363(f) of the Bankruptcy Code seeking approval of a proposed sale agreement and a declaration that the proposed purchaser would be relieved of any Coal Act tax liability that otherwise might be imposed as a result of the transaction.

The Trustees opposed the requested relief in both cases. They argued that respondents' motions would undermine the purposes of the Coal Act and that the Bankruptcy Code cannot be interpreted to insulate a third-party purchaser from Coal Act tax liability. The Trustees explained that their statutory obligation to collect premiums on behalf of the beneficiaries of the 1992 Plan and the Combined Fund is neither an "interest in property" nor a "claim" that can be eliminated in bankruptcy. In each of the two cases, the district court overruled the Trustees' objections, but for different reasons.

In *Leckie*,[10] the district court correctly held that Coal Act obligations are taxes, and that successor obligations arising under the Coal Act cannot be discharged in bankruptcy. Although the court concluded—erroneously, in the Trustees' view—that the Trustees' interest constitutes a "claim" and an "interest in property" subject to a sale in bankruptcy under Section 363(f) of the Bankruptcy Code, the court properly held that the assets of respondents could not be sold "free and clear" of any future successor Coal Act liability because the Act expressly prohibits such a result. App. 42a, 45a-47a. The court then ruled, however, that the term "successor," as used in the Coal Act, should be defined in accordance with a highly restrictive definition contained in an unrelated Treasury Regulation, 26 C.F.R. § 1.1503-2(c)(12). Applying that definition, the court concluded that a purchaser of assets in bankruptcy can never be a successor under the Coal Act, and on that basis overruled the Trusetees' objections. App. 44a.

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[10] Upon the Trustees' motion, the district court in *Leckie* withdrew the reference to the bankruptcy court. App. 30a-31a.

In *Lady H*,[11] which was decided a week after *Leckie*, the district court overruled the objections of the Trustees and adopted the *Leckie* opinion in its entirety, deeming *Leckie* to constitute binding precedent. In the alternative, however, the *Lady H* court held that even if a purchaser of assets in bankruptcy could be a "successor" under the Coal Act, the purchaser's potential future liability for Coal Act taxes nevertheless could be extinguished in a sale of assets under Section 363(f) of the Bankruptcy Code, a conclusion contrary to that reached by the *Leckie* court. App. 55a.

Recognizing the significance of its decision, the district court in each case granted the Trustees' motion to certify the matter for immediate appeal under 28 U.S.C. § 1292 (b). App. 11a, 13a. The court of appeals granted leave to pursue interlocutory appeals and consolidated the cases for briefing and argument. App. 13a.

C. The Decision of the Court of Appeals

The court of appeals affirmed, but only on the alternative ground adopted in *Lady H*. Although the court of appeals acknowledged that Coal Act premiums are taxes, the court disregarded prior law treating future, unaccrued taxes as an entirely separate category from pre-petition "claims" under the Bankruptcy Code. Citing Congress's desire that the term "claim" be interpreted broadly under the Bankruptcy Code to include "all legal obligations of the debtor, no matter how remote or contingent," the court held that potential future Coal Act tax obligations of the third-party purchasers, though not yet accrued, fixed, due, or owing, nevertheless could be accelerated into a single pre-petition "claim" in respondents' bankruptcies. Because the Coal Act was enacted prior to respondents' bankruptcies, the court concluded that respondents' liability for future Coal Act premiums was fixed at the time of their bankruptcy filings based on their pre-petition acts.

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[11] In *Lady H*, the district court denied withdrawal of the reference, but instructed the bankruptcy court to submit proposed findings of fact, conclusions of law, and a recommendation for disposition of the Trustees' objections. App. 53a.

App. 16a. The court of appeals also held that Coal Act premiums constitute an "interest in property" within the meaning of Section 363(f) of the Bankruptcy Code. App. 19a.[12]

Notwithstanding its conclusion that Coal Act obligations are taxes, the court held that neither the Declaratory Judgment Act nor the Anti-Injunction Act barred the district court from issuing the requested declaratory relief. The court appeared to acknowledge that ordinarily these statutes would prohibit the requested relief, and it also appeared to accept that the third-party purchasers would have a right to seek judicial review of future Coal Act taxes if and when they were assessed. Nonetheless, the court agreed to proceed in the manner requested by respondents, on the ground that respondents "do not have an 'alternative legal way' to challenge the imposition of Coal Act successor liability on the purchasers of their assets . . . ." App. 24a.

On the merits, the court of appeals adopted the alternative ground set forth by the district court in *Lady H*, *i.e.*, even if third-party purchasers in bankruptcy are found to be "successors" within the meaning of the Coal Act, any potential successor liability may be extinguished pursuant to Section 363(f)(5).[13] Thus, in the court's view, even if a purchaser in a bankruptcy proceeding is a "successor" to that operator under the Coal Act, the purchaser nevertheless can avoid future Coal Act tax obligations by

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[12] Despite its acknowledgment that Coal Act premiums are taxes, and notwithstanding the lack of any actual or threatened tax assessment against the third-party purchasers, the court ruled that respondents had standing to contest the potential future tax liability of the third-party purchasers, and that the future tax liability of those purchasers was ripe for decision. Because the purchasers had stated that they would not proceed with the proposed asset acquisitions in the absence of the requested declaratory relief, the court declared that it was proper to proceed in the manner urged by respondents.

[13] The court of appeals did not reach the question whether the third-party purchasers of respondents' assets would be "successors" or "successors in interest" within the meaning of the Act.

obtaining a Section 363(f) "free and clear" order from a bankruptcy court.

The court summarily dismissed any concern that its decision threatened a return to the funding crisis that led Congress to pass the Coal Act in 1992. App. 29a. In doing so, the court disregarded the clear legislative intent to protect retiree health benefits under the Coal Act, and instead placed greater weight on respondents' contention that, in the absence of the requested declaratory relief, the proposed asset sales would not go forward. App. 29a.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the future ability of the Trustees to provide retiree health benefits pursuant to the congressional mandate expressed in the Coal Act. If not reviewed by this Court, these issues will dramatically and negatively affect many thousands of retirees and their families each year, as more and more coal operators file for bankruptcy in response to changing economic conditions. If allowed to stand, the decision of the court of appeals will encourage these and other coal operators to use bankruptcy to avoid their Coal Act obligations. The petition should be granted to resolve these issues that threaten to recreate the funding crisis that led to the enactment of the Coal Act in the first place.

Notwithstanding its finding that Coal Act premiums are taxes, the court of appeals in this case conflated the terms "taxes" and pre-petition "claims" under the Bankruptcy Code. The court of appeals held that all future Coal Act taxes that otherwise might be assessed against a third-party purchaser properly can be characterized as a single pre-petition "claim" that can be extinguished in a bankruptcy sale. This result-oriented ruling, driven by a desire to permit the proposed sale of respondents' assets, is inconsistent with the Bankruptcy Code's treatment of taxes and is a clear deviation from prior law, which has treated on-going tax obligations and pre-petition bankruptcy

"claims" as entirely separate categories entitled to different treatment in bankruptcy. The holding by the court effectively annuls and reverses the precisely opposite treatment of taxes that Congress provided under the Bankruptcy Code.

The decision of the court of appeals is in direct conflict with the Second Circuit's ruling in *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995). The Second Circuit there held that Coal Act premiums are periodic taxes that do not constitute a single "claim" subject to discharge under the Bankruptcy Code. The *LTV* court ruled that, because Coal Act obligations are taxes, "the portion of LTV's Coal Act liability accruing during the pendency of its bankruptcy is entitled to treatment as an administrative expense of the estate" and the reorganized company remains liable for those taxes accruing after bankruptcy. *Id.* at 498. Although the court of appeals in this case agreed with the Second Circuit's holding that Coal Act premiums are taxes, the court disregarded *LTV*'s reasoning regarding the consequences of that holding for purposes of the treatment to be afforded Coal Act obligations under the Bankruptcy Code. As a consequence, the court rendered a decision that cannot be reconciled with *LTV*.

In addition to disregarding the prior treatment of taxes in bankruptcy, the court of appeals also extended to courts in bankruptcy matters the power to absolve a third party from any liability for Coal Act taxes that otherwise might be imposed in the future. By allowing the lower courts to determine the tax liability of a nondebtor, the court improperly expanded the jurisdiction conferred under the Bankruptcy Code. This holding is at odds with decisions by other courts of appeals and threatens to disrupt the enforcement not only of Coal Act taxes but of other taxes as well.

These conflicts cannot be permitted to persist. The issues are of widespread significance, dramatically affect-

ing the funding base for retiree health benefits that Congress sought to protect in enacting the Coal Act. In the Coal Act, Congress intended to create a stable system of funding retiree health benefits for tens of thousands of retirees and their families. The operation of that system should not vary dramatically from circuit to circuit. A coal operator should not be permitted to sell its assets in a bankruptcy in the Fourth Circuit to a purchaser who will have no obligation to pay the cost of health care for the retirees formerly employed by the debtor when, at the same time, purchasers in the Second Circuit must comply with those obligations. The venue of choice for a coal operator's bankruptcy should not be determined by which court will allow an operator to eliminate its tax obligations to fund retiree health benefits under the Coal Act.

If allowed to stand, the decision of the court of appeals inevitably will lead to increased litigation under the Coal Act. It will encourage coal operators to file for bankruptcy to extinguish their Coal Act obligations. Although those operators' bankruptcies may result in some small payment of Coal Act taxes, the lion's share of the operators' funding obligations inevitably would be shifted to other coal operators that continue to pay Coal Act premiums. This would dramatically erode the funding base for retiree health benefits that Congress specifically sought to ensure through the Coal Act. In the case of the 1992 Plan, for example, for every beneficiary for whom the Trustees do not receive a monthly per beneficiary premium from the beneficiary's last signatory operator, the annual pre-funding premium must be increased for every other operator contributing to the 1992 Plan. These consequences involve hundreds of millions of dollars.[14]

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[14] Just recently, Westmoreland Coal Company, once one of the largest coal companies in the United States, and four subsidiaries filed bankruptcy petitions in the United States Bankruptcy Court for the District of Colorado, seeking to use reorganization under Chapter 11 of the Bankruptcy Code as a means of modifying or eliminating their Coal Act obligations. *See Westmoreland Coal*

Notwithstanding the apparent view of the court of appeals to the contrary, if the Trustees prevail in this case, as they should, economically viable assets will not go unsold or waste away. Rather, as in similar situations, the debtor-sellers and the purchasers of those assets will have to comply with their Coal Act obligations and fund retiree health benefits as Congress intended or, at minimum, reach an equitable negotiated resolution with the Trustees, as fiduciaries for the beneficiaries of the 1992 Plan and the Combined Fund. The court of appeals' decision to substitute its own policy judgment for Congress's legislative directive is unsupportable.

This Court should grant review to rectify the errors of the court of appeals and to establish that coal operators may not use bankruptcy to extinguish future, unassessed tax obligations that otherwise might be imposed under the Coal Act.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH PRIOR LAW THAT HAS TREATED FUTURE TAXES AND PRE-PETITION BANKRUPTCY CLAIMS AS MUTUALLY EXCLUSIVE CATEGORIES UNDER THE BANKRUPTCY CODE.

a. The Bankruptcy Code grants preferential treatment to taxes in bankruptcy. *See United States v. Flo-Lizer, Inc. (In re Flo-Lizer, Inc.)*, 916 F.2d 363, 366 (6th Cir. 1990) (taxing authority is given preferred treatment under the Bankruptcy Code because it is involuntary creditor); *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714, 719 (4th Cir. 1989) (importance of taxes imposed to protect employees who depend on financial soundness of workers' compensation fund outweighs general policy of limiting

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Co., 96-26092 (Bankr. D. Colo. Dec. 23, 1996); *Westmoreland Terminal Co.*, 96-26093 (Bankr. D. Colo. Dec. 23, 1996); *Westmoreland Energy Co.*, 96-26094 (Bankr. D. Colo. Dec. 23, 1996); *Westmoreland Coal Sales Co.*, 96-26095 (Bankr. D. Colo. Dec. 23, 1996); *Westmoreland Resources, Inc.*, 96-26096 (Bankr. D. Colo. Dec. 23, 1996). The debtors' own estimate of the present value of their future Coal Act liabilities exceeds $130 million.

priority claims); *Maryland Nat'l Bank v. Mayor and City Council of Baltimore*, 723 F.2d 1138, 1146 (4th Cir. 1983) ("No one supposes that the bankruptcy trustee would enjoy the power to avoid" future tax liabilities). Under Section 1141(d) of the Bankruptcy Code, Congress expressly provided that taxes incurred during the pendency of bankruptcy do not constitute a pre-petition debt that is subject to discharge. 11 U.S.C. § 1141(d). Indeed, unlike pre-petition claims, those obligations are paid first as "administrative expenses" under the priority scheme established by Congress in the Bankruptcy Code. 11 U.S.C. §§ 503(b)(1)(B), 507(a)(1). Even certain taxes incurred within a specified time before the bankruptcy filing are entitled to payment as priority claims, unlike other pre-petition claims. 11 U.S.C. § 507(a)(8); *see also United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 116 S. Ct. 2106, 2112 n.6 (1996) (observing that "no case 'has denied bankruptcy priority to a congressionally enacted tax' ") (quoting Thomas, J., concurring in part, dissenting in part).

The legislative history of the Bankruptcy Code reflects Congress's intent to protect taxes in bankruptcy. Congress chose to give a taxing authority preferred treatment "because it is an involuntary creditor of the debtor," unlike other creditors. *See, e.g.*, H.R. Rep. No. 95-595, at 190 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6150; *see also* S. Rep. No. 95-989, at 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5800 (explaining that taxes incurred within specified time frames prior to bankruptcy and during bankruptcy are to be afforded priority treatment).

Courts have treated taxes in a manner consistent with the congressional directive set forth in the Bankruptcy Code. Taxes are considered separate liabilities that arise as those taxes accrue during bankruptcy. *See LTV*, 53 F.3d at 498 (Coal Act taxes incurred during bankruptcy are treated as administrative expenses of estate); *see also, e.g., Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948) (each tax period is the origin of a new liability

and a separate cause of action). *In re Blue Coal Corp.*, 166 B.R. 816, 822 (Bankr. M.D. Pa. 1993) ("The relationship of taxpayer to tax recipient is such that the creditor-debtor relationship accrues on an annual basis rather than on some sort of open account."). Thus, where a statute has prescribed that a tax corresponds to an event occurring during a specified period of time, the courts have found that a separate tax obligation arises when each event occurs. *See, e.g., West Virginia State Dep't of Tax & Revenue v. IRS (In re Columbia Gas Transmission Corp.)*, 37 F.3d 982, 986 (3d Cir. 1994) (ownership of property for a given tax year gives rise to tax liability for that year), *cert. denied*, 115 S. Ct. 1793 (1995); *Burns v. City of Winston-Salem (In re Members Warehouse, Inc.)*, 991 F.2d 116, 119 (4th Cir. 1993) (tax accrues on annual posting of property); *LTV*, 53 F.3d at 498. To the extent that any taxes accrue during the pendency of a bankruptcy, those taxes constitute administrative expenses of the bankruptcy estate and must be paid in full under the priority scheme set forth in the Bankruptcy Code. *See Towers v. United States (In re Pacific Atlantic Trading Co.)*, 64 F.3d 1292, 1303 (9th Cir. 1995) ("Taxes for periods which occur entirely post-petition are afforded administrative expense priority under § 503(b)(1)(B)"); *LTV*, 53 F.3d at 498 (same); *United States v. Friendship College, Inc. (In re Friendship College, Inc.)*, 737 F.2d 430, 431-32 (4th Cir. 1984).

Notwithstanding the special treatment afforded taxes under the Bankruptcy Code, the court of appeals ruled that all Coal Act tax premiums that otherwise might be asserted in the future against a third-party purchaser (a party other than the debtor) constitute a single pre-petition "claim" that is subject to elimination in bankruptcy. The court of appeals' holding reflects an implicit policy judgment to deviate from Congress's treatment of taxes under the Bankruptcy Code and to ignore the nature of the Trustees' tax claims in favor of a potentially larger recovery for other creditors. In enacting the Bankruptcy Code, however, Congress made an unequivocal determi-

nation that taxes would be entitled to preferential treatment in bankruptcy. By using an unrestrained interpretation of the term "claim" and a distorted characterization of the nature of Coal Act taxes, the decision by the court of appeals effectively repeals that specific legislative determination. As this Court has explained, however, a court must give effect to the Bankruptcy Code and cannot make a policy decision to alter Congress's intent as expressed in the Bankruptcy Code. *United States v. Noland*, 116 S. Ct. 1524, 1527-28 (1996); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *see also Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994) (bankruptcy courts do not enjoy a blanket power to maximize the sales price for a debtor's assets).

If the court of appeals' approach were extended to other taxes (and nothing in the court's opinion suggests why it could not be), it would produce intolerable results. Any statute imposing a tax presumably would be subject to elimination in bankruptcy because it could be characterized as a pre-petition obligation. Debtors would be permitted to disregard their tax obligations with impunity. As this Court repeatedly has recognized, however, the payment scheme set forth in the Bankruptcy Code reflects a determination by Congress that certain categories of obligations are entitled to special protection and cannot be ignored. These categories may not be altered by the courts based on principles of fairness or otherwise. *Noland*, 116 S. Ct. at 1527-28.

b. The court of appeals' decision also is inconsistent with the express provisions of the Coal Act itself. In light of the structure of the Coal Act and the nature of Coal Act premiums as taxes, the only sensible interpretation of the statute is that, like other taxes, Coal Act premiums accrue on an on-going basis and cannot be properly characterized as a single pre-petition "claim."

As the court of appeals acknowledged, a pre-petition "claim" does not arise unless all the elements of a legal obligation, *i.e.*, a "right to payment," exist before the

filing of the bankruptcy petition. App. 14a-15a.[15] A pre-petition "right to payment" exists only if an enforceable obligation arose before the bankruptcy. *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *Al Tech Specialty Steel Corp. v. Allegheny Int'l Inc. (In re Allegheny Int'l, Inc.)*, 126 B.R. 919, 925 (Bankr. W.D. Pa.) , *aff'd*, 950 F.2d 721 (3d Cir. 1991).[16] As the Coal Act makes clear, Coal Act taxes are not enforceable until they are assessed for a particular time period, and the Trustees have no "right to payment" of the taxes until an assessment is made.

Under the Coal Act, Combined Fund and 1992 Plan premiums are incurred for specific periods, and give rise to a new obligation to pay each time they accrue. Therefore, to the extent that a debtor incurs Coal Act tax liability after the filing of a bankruptcy petition, the Trustees' right to demand payment of those premiums also arises post-petition and simply cannot constitute a single pre-petition "claim" that is subject to elimination in bankruptcy.

Although the court of appeals' interpretation permits the proposed sale of the debtors' assets to proceed unhindered, that is not a principled basis for decision, especially when the result is accomplished in derogation of the congressional intent underlying the Coal Act and the Bankruptcy Code. The Trustees' interpretation of the Coal Act, on the other hand, is consistent with the language of the Coal Act, furthers Congress' stated intent to create a stable funding base for the provision of health care to retired miners and their survivors and dependents,

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[15] *See also LTV*, 53 F.3d at 497 (citing *In re Nat'l Gypsum Co.*, 139 B.R. 397, 405 (N.D. Tex. 1992)); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835 (D. Minn. 1990).

[16] A "right to payment" does not include a future debt. *See River Place East Housing Corp. v. Rosenfeld (In re Rosenfeld)*, 23 F.3d 833, 837 (4th Cir.), *cert. denied*, 115 S. Ct. 200 (1994); *In re Piper Aircraft Corp.*, 162 B.R. 619, 629 (Bankr. S.D. Fla.), *aff'd*, 168 B.R. 434 (S.D. Fla. 1994), *aff'd sub nom. Epstein v. Official Comm. of Unsecured Creditors*, 58 F.3d 1573 (11th Cir. 1995).

and fulfills the purpose behind those sections of the Bankruptcy Code relating to taxes.

c. The present conflict among the courts of appeals that have addressed the proper treatment of Coal Act taxes under the Bankruptcy Code is significant. In *LTV*, the Second Circuit held that Coal Act obligations are distinct and several liabilities that do not constitute a single pre-petition "claim." The Second Circuit specifically rejected any notion that Coal Act taxes arise from pre-petition conduct. *LTV*, 53 F.3d at 497. The court also held that those taxes assessed after completion of the bankruptcy are not discharged, but rather are the responsibility of the reorganized entity. *Id.* at 498.

Contrary to the Second Circuit's decision in *LTV*, the court of appeals in this case held that the debtors owed a single pre-petition obligation to the Trustees for all taxes—past, present, or future, assessed or unassessed—under the Coal Act (App. 15a-17a), and that such obligation arose from the debtors' "pre-petition, rather than post-petition, acts." App. 16a. Accordingly, the court of appeals concluded that the Trustees have pre-petition "claims" in the debtors' bankruptcy cases for all premium payments that otherwise might be assessed in the future against the debtors or their potential nondebtor "successors" under the Coal Act. On this basis, the court held that the Trustees' rights to assess future taxes against any successor of the debtors could be extinguished through a sale of the debtors' assets pursuant to Section 363(f) of the Bankrupcy Code. App. 16a.

The court of appeals in this case attempted to distinguish *LTV* on the sole ground that LTV and its affiliates had filed for bankruptcy years before the enactment of the Coal Act, so that the Combined Fund could not have had a "claim" for premiums at the time of LTV's bankruptcy filing. App. 15a. The court reasoned that, unlike the debtors in *LTV*, the debtors in this case filed for bankruptcy protection after the 1992 enactment of the Coal Act. Although it is true that the Second Circuit in

LTV discussed the timing of the debtors' petition in relation to the enactment date of the Coal Act, that was by no means the only, or even the principal, basis for the decision. Indeed, the *LTV* court expressly rejected the argument accepted by the court of appeals in this case—that Coal Act obligations not yet accrued can be eliminated through bankruptcy. *LTV*, 53 F.3d at 498.

Even more important, the court of appeals' decision is utterly irreconcilable with the portion of the *LTV* opinion that discusses the treatment to be afforded Coal Act premiums as on-going taxes. As set forth above, the Second Circuit concluded that Coal Act tax premiums accruing after the bankruptcy filing are entitled to be treated as administrative expenses of the bankruptcy estate as they are incurred. Indeed, if the Second Circuit had adopted the reasoning used by the court of appeals that all Coal Act tax premiums are incurred at once, then *all* of LTV's potential Coal Act premium obligations would have been immediately payable as an administrative expense of the estate. *See* 11 U.S.C. § 503(b)(1)(B) (administrative expenses include "any tax incurred by the estate"). *LTV* makes clear, however, that the Coal Act premiums cannot be collapsed into a single pre-petition claim in bankruptcy.

The question whether Coal Act taxes constitute a single pre-petition bankruptcy claim involves hundreds of millions of dollars that constitute the life blood of the retiree health benefits provided by the Combined Fund and the 1992 Plan. Unless this important and recurring issue is resolved by this Court, the existing conflict among the courts of appeals not only will produce repetitive and wasteful litigation and disparate treatment of identical claims, but also will cause the systematic elimination of the funding source for retiree health benefits that Congress sought to protect when it enacted the Coal Act.

II. THE COURT OF APPEALS' HOLDING THAT THE LOWER COURTS HAD JURISDICTION TO ABSOLVE NONDEBTOR THIRD PARTIES FROM FUTURE COAL ACT TAXES CONFLICTS WITH THE BANKRUPTCY CODE AND PRIOR DECISIONS.

The court of appeals decided that the lower courts could grant declaratory relief absolving the nondebtor third-party purchasers of future Coal Act tax liability under the Bankruptcy Code, notwithstanding the prohibitions in the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Anti-Injunction Act, 26 U.S.C. § 7421, against such relief. Under the court of appeals' view, the courts had jurisdiction to adjudicate the future Coal Act tax liability of the nondebtors. This holding not only conflicts with decisions by other circuits and undermines the purpose of the Bankruptcy Code, but also sets a dangerous precedent that warrants review by this Court.

The court of appeals' decision is at odds with decisions of the Second and Eleventh Circuits. Those courts have held that a court has no jurisdiction to determine the tax liabilities of a nondebtor under the Bankruptcy Code. *See, e.g., Brandt-Airflex Corp. v. Long Island Trust Co. (In re Brandt-Airflex Corp.)*, 843 F.2d 90, 95-96 (2d Cir. 1988) (citing cases); *United States v. Huckabee Auto. Co.*, 783 F.2d 1546, 1549 (11th Cir. 1986).

As the Second Circuit observed in *Brandt-Airflex*, while Section 505(a) of the Bankruptcy Code permits a court to make determinations regarding "any" tax liability, the legislative history of the Code demonstrates that Congress never intended to extend that jurisdiction to the tax liability of nondebtors. 843 F.2d at 96. The relevant Senate committee report described Section 505(a) as "permit[ting] determination by the bankruptcy court of any unpaid tax liability of the *debtor*." S. Rep. No. 95-989, at 67 (1978) (emphasis added), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5853. "In light of this statement, it makes far more sense to read § 505(a) as limiting the bankruptcy court's jurisdiction" to the tax liability of the debtor. *Brandt-Airflex*, 843 F.2d at 96.

As the Second Circuit has noted, a contrary rule would lead to absurd results. " '[T]aken at face value, without recourse to the legislative history, § 505 makes the Bankruptcy Courts a second tax court system, empowering the Bankruptcy Courts to consider 'any' tax whatsover, on whomsoever imposed.' " 843 F.2d at 96 (quoting *In re Interstate Motor Freight Sys.*, 62 B.R. 805, 809 (Bankr. W.D. Mich. 1986)). The Bankruptcy Code, however, is not intended to benefit the nondebtor who has not filed for bankruptcy protection. *Id.*; *Huckabee Auto.*, 783 F.2d at 1549.

The fact that a debtor is jointly and severally liable for a tax obligation (as in the case of Coal Act taxes) does not provide a basis for assuming jurisdiction over the tax obligations of a nondebtor. *See Brandt-Airflex*, 843 F.2d at 96 (citation omitted); *Huckabee Auto.*, 783 F.2d at 1548-49. In fact, the Bankruptcy Code specifically prohibits the discharge of the joint and several liability of such nondebtors. Section 524(e) of the Bankruptcy Code explicitly states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e); *see also Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1449 (6th Cir. 1993) (discharge of principal debtor does not discharge liabilities of guarantor); *Teamsters Joint Council No. 83 v. CenTra, Inc.*, 947 F.2d 115, 121-22 (4th Cir. 1991) (debtor's discharge did not affect joint and several liability of controlled group members); *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 626 (9th Cir. 1989) (denying injunction that would have precluded action against successor, where requested relief constituted impermissible discharge of non-bankruptcy third party in violation of Section 524(e) of the Bankruptcy Code).

The court of appeals here failed even to acknowledge the split in the courts of appeals concerning this issue, much less to explain why a court has jurisdiction to decide the Coal Act tax liabilities of a nondebtor under the

Bankruptcy Code. *Compare Michigan Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1140-43 (6th Cir. 1991) (court has jurisdiction to determine tax liabilities of a nondebtor), *cert. dismissed*, 503 U.S. 978 (1992), *and Quattrone Accountants, Inc. v. IRS*, 895 F.2d 921, 924 (3d Cir. 1990) (jurisdiction in bankruptcy extends to nondebtors), *with Brandt-Airflex Corp.*, 843 F.2d at 95-96 (no such jurisdiction), *and Huckabee Auto.*, 783 F.2d at 1549 (same). The court instead addresed only the issue of whether the Declaratory Judgment Act and the Anti-Injunction Act barred the entry of the requested relief. The court concluded that respondents had no other way of establishing the nondebtor third-party purchasers' lack of Coal Act tax liability, and that therefore respondents could obtain the relief sought, notwithstanding the restrictions in those statutes.

The court cited *South Carolina v. Regan*, 465 U.S. 367 (1984), as support for this position. But *Regan* does not go so far. Rather, *Regan* involved a challenge to the *legality* of a tax, and, with the exception of the present case, subsequent court of appeals decisions have limited this Court's holding to that context. *See, e.g., Laughlin v. IRS*, 912 F.2d 197, 199 (8th Cir. 1990) (*Regan* exception did not apply because the debtors did not dispute the validity of the tax), *cert. denied*, 498 U.S. 1120 (1991); *American Bicycle Ass'n v. United States (In re American Bicycle Ass'n)*, 895 F.2d 1277, 1280 (9th Cir. 1990) (same); *LaSalle Rolling Mills, Inc. v. IRS (In re LaSalle Rolling Mills, Inc.)*, 832 F.2d 390, 393 (7th Cir. 1987) (same). Here, respondents did not dispute the validity of any Coal Act taxes, and *Regan* therefore does not help them.

The practical effect of the court of appeals' decision is highly undesirable. By allowing a debtor to seek declaratory relief absolving a nondebtor third party from any future Coal Act tax liability, the decision would expand impermissibly the jurisdiction of courts in bankruptcy This would wreak havoc not only with the tax collection

efforts of the Trustees under the Coal Act, but also with the collection efforts of taxing authorities under other statutes. Because of the jurisdictional issue's overriding importance to the administration of the Coal Act and other federal statutes, and the clear conflict among the circuits, review is warranted on this basis alone.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 14, 1997

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1708

IN RE: LECKIE SMOKELESS COAL COMPANY;
NEW RIVER MINERAL RESOURCES COMPANY;
GOULD RESOURCES, INCORPORATED,
Debtors.

UNITED MINE WORKERS OF AMERICA 1992
BENEFIT PLAN, and its Trustees; UNITED MINE
WORKERS OF AMERICA COMBINED BENEFIT
FUND, and its Trustees,
Movants-Appellants,

v.

LECKIE SMOKELESS COAL COMPANY;
NEW RIVER MINERAL RESOURCES COMPANY;
GOULD RESOURCES, INCORPORATED;
ROYAL SCOT MINERALS, INCORPORATED,
Defendants-Appellees,

and

UNSECURED CREDITORS COMMITTEE;
OFFICE OF THE UNITED STATES TRUSTEE,
Parties-in-Interest.

No. 96-1849

IN RE: LECKIE SMOKELESS COAL COMPANY;
NEW RIVER MINERAL RESOURCES COMPANY;
GOULD RESOURCES, INCORPORATED,
Debtors.

UNITED MINE WORKERS OF AMERICA 1992
BENEFIT PLAN, and its Trustees; UNITED MINE
WORKERS OF AMERICA COMBINED BENEFIT
FUND, and its Trustees,
Movants-Appellants,

v.

LECKIE SMOKELESS COAL COMPANY;
NEW RIVER MINERAL RESOURCES COMPANY;
GOULD RESOURCES, INCORPORATED;
ROYAL SCOT MINERALS, INCORPORATED,
Defendants-Appellees,

and

UNSECURED CREDITORS COMMITTEE;
UNITED STATES TRUSTEE,
Parties-in-Interest.

Appeals from the United States District Court
for the Southern District of West Virginia, at Beckley,
Elizabeth V. Hallanan, District Judge.
CA-96-92-5)

No. 96-1739

IN RE: LADY H COAL COMPANY, INCORPORATED;
CONSOLIDATED SEWELL, INCORPORATED;
SEWELL COAL COMPANY;
LEIVASY MINING CORPORATION;
EASTWOOD CONSTRUCTION, INCORPORATED,
Debtors.

LADY H COAL COMPANY, INCORPORATED;
CONSOLIDATED SEWELL, INCORPORATED;
SEWELL COAL COMPANY;
LEIVASY MINING CORPORATION;
EASTWOOD CONSTRUCTION, INCORPORATED,
Debtors-Appellees,

v.

UNITED MINE WORKERS OF AMERICA 1992
BENEFIT PLAN, and its Trustees,
Movant-Appellant,

and

UNITED MINE WORKERS OF AMERICA COMBINED
BENEFIT FUND, and its Trustees,
Movant,

and

INTERNATIONAL UNION, UNITED MINE
WORKERS OF AMERICA; DISTRICT 17, UNITED
MINE WORKERS OF AMERICA,
Parties-in-Interest.

No. 96-1850

IN RE: LADY H COAL COMPANY, INCORPORATED;
CONSOLIDATED SEWELL, INCORPORATED;
SEWELL COAL COMPANY;
LEIVASY MINING CORPORATION;
EASTWOOD CONSTRUCTION, INCORPORATED,
Debtors.

LADY H COAL COMPANY, INCORPORATED;
CONSOLIDATED SEWELL, INCORPORATED;
LEIVASY MINING CORPORATION;
EASTWOOD CONSTRUCTION, INCORPORATED,
Debtors-Appellees,

v.

UNITED MINE WORKERS OF AMERICA 1992
BENEFIT PLAN, and its Trustees,
Movant-Appellant,

and

INTERNATIONAL UNION, UNITED MINE
WORKERS OF AMERICA; DISTRICT 17, UNITED
MINE WORKERS OF AMERICA,
Parties-in-Interest.

Appeals from the United States District Court
for the Southern District of West Virginia, at Charleston,
Charles H. Haden II, Chief District Judge.
(MC-96-33-2, BK-94-20449, BK-94-20765, BK-94-20766,
BK-94-20767, BK-94-20710)

Argued: July 18, 1996
Decided: October 29, 1996

Before MURNAGHAN and ERVIN, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

OPINION

MURNAGHAN, Circuit Judge:

Appellants in these consolidated cases are the 1992 UMWA Benefit Plan and the UMWA Combined Benefit Fund, both of which were established pursuant to the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722. Appellees are coal operators that have filed voluntary petitions for bankruptcy relief and that have asked the Bankruptcy Court to declare that the purchasers of their assets will not be jointly and severally liable, as their successors in interest, for their financial obligations to the Plan and the Fund. The district courts held that the purchasers of Appellees' assets would not be Appellees' successors in interest within the meaning of the Coal Act and therefore authorized the Bankruptcy Court to permit the sales free and clear of Appellees' Coal Act liabilities. In the second of the two cases before us, the District Court held, in the alternative, that, even if the purchasers of the debtors' assets would be the debtors' successors in interest, the Bankruptcy Court could extinguish all successor liabilities arising under the Coal Act by entering a free and clear order pursuant to 11 U.S.C. § 363(f)(5). On the strength of the latter line of reasoning, and without reaching the question of whether the purchasers would be Appellees' successors in interest, we affirm the judgments of the district courts.

I.

The events spurring the enactment of the Coal Act have been described elsewhere, *see, e.g., Blue Diamond Coal Co. v. Shalala* (*In re Blue Diamond Coal Co.*), 79 F.3d 516, 518-20 (6th Cir. 1996); *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1117-19 (7th Cir. 1996), *pets. for cert. filed*, 64 U.S.L.W. 3741, 3742 (Apr. 22 & 23, 1996); *LTV Steel Co. v. Shalala* (*In re Chateaugay Corp.*), 53 F.3d 478, 481-86 (2d Cir.), *cert. denied*, —— U.S. ——, 116 S. Ct. 298 (1995), and need not be thoroughly recounted here. In short, the pertinent facts are these. Beginning in 1946, coal miners received pension and health benefits pursuant to a series of employer-funded plans negotiated by their union, the United Mine Workers of America ("UMWA"), and the Bituminous Coal Operators Association ("BCOA"). *LTV Steel Co.*, 53 F.3d at 481-85. From 1974 until 1978, non-pension benefits were provided under two plans—the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan—with the former providing benefits to miners who retired prior to January 1, 1976, and the latter providing benefits to miners who retired after that date. *Id.* at 482. In 1978, the UMWA and BCOA agreed partially to decentralize the scheme; they agreed that each miner retiring after January 1, 1976, would receive health benefits pursuant to a plan created and funded by his or her last employer, and that the 1974 UMWA Benefit Plan would provide health benefits only to those retirees who had been "orphaned"—that is, those retirees whose last employer had gone out of business. *Id.* at 482-83.

In the 1980s, the 1950 and 1974 plans began to face serious financial difficulties; the number of employers contributing to the plans declined, the number of orphaned miners increased, and the costs of health care soared. *Id.* at 483-84. Congress responded in 1992 by enacting the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-56 (codified at 26

U.S.C. §§ 9701-9722). The overarching purpose of the Act was to establish a system whereby each current and former signatory operator—that is, each operator that "is or was a signatory to a coal wage agreement," as such agreements are defined in section 9701(b)(1) of the Act, *see* § 9701(c)(1)—is required to pay for the benefits provided to its own retirees and to share in the cost of providing benefits to orphaned retirees.[1] *LTV Steel Co.*, 53 F.3d at 485. Toward that end, Congress created two new benefit plans.

First, it established the UMWA Combined Benefit Fund ("the Fund") by merging the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. *See* 26 U.S.C. § 9702(a). The Fund provides health and death benefits to coal industry retirees who, as of July 20, 1992, were eligible for, and receiving, benefits under either the 1950 or the 1974 plan. *Id.* § 9703(a), (f). The Fund is financed by annual per-beneficiary premiums paid in monthly installments by "assigned operators." *Id.* §§ 9704, 9706; *see id.* § 9701(c)(5) ("defining "assigned operators"); *id.* § 9706(a) (describing the manner in which beneficiaries are assigned to operators). An assigned operator's "related persons" are jointly and severally liable for the operator's premiums. *Id.* §§ 9704(a). An entity is deemed a person related to an operator if it is

> (i) a member of the controlled group of corporations . . . which includes such signatory operator;

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[1] Congress found that,

> in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

Pub. L. No. 102-486, 106 Stat. 2776, 3037.

(ii) a trade or business which is under common control . . . with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries . . . .

Id. § 9701(c)(2). An entity is also an operator's "related person" if it is a "successor in interest of any person described in clause (i), (ii), or (iii)." *Id.* The Act does not define the phrase "successor in interest."

Second, Congress established the 1992 UMWA Benefit Plan ("the Plan"). *Id.* § 9712(a). The Plan provides health benefits to retirees who retired prior to September 30, 1994, and who, among other things, are not eligible to receive benefits from the Combined Benefit Fund. *Id.* § 9712(b). The Plan is financed by annual and monthly premiums paid by the beneficiaries' "last signatory operators."[2] *Id.* § 9712(d)(1), (3). An operator's "successor in interest" and "related persons" are jointly and severally liable for the operator's premiums. *Id.* §§ 9711(g)(1), 9712(d)(4).

II.

The instant appeals concern two separate cases arising from the Southern District of West Virginia. The pertinent facts concerning those cases are as follows.

A. *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.*

Appellees in the first of the two cases before us are Leckie Smokeless Coal Company, the New River Mineral Resources Company, and Gould Resources, Inc. Until

[2] The Act imposes differing liabilities upon "1988 last signatory operators," *see* 26 U.S.C. § 9712(d)(1), and upon all other last signatory operators, *see id.* § 9712(d)(3); *see also id.* § 9701(c)(3) (defining the term "1988 agreement operator").

January 1994, Leckie conducted coal mine operations in West Virginia. New River and Gould are affiliates of Leckie that own leases of coal lands located adjacent to Leckie's property. Together, the three companies have been assigned 140 beneficiaries for purposes of Combined Benefit Fund liability and, with respect to the 1992 UMWA Benefit Plan, are the last signatory employers of 87 retirees. Leckie has stated that its total Coal Act liabilities exceed $7 million and that its monthly premiums exceed $60,000.

Appellees have each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.[3] Joseph C. Turley III, president of each of the three companies, wishes to sell Appellees' assets pursuant to 11 U.S.C. §§ 363, 365 to Royal Scot Minerals, Inc., for approximately $1.9 million. As a condition of the purchase, Royal Scot has insisted that it take Appellees' property "free and clear" of all successor liabilities that might arise under the Coal Act. *See* 11 U.S.C. § 363(f) (stating the conditions under which a trustee may sell property "free and clear of any interest in such property of an entity other than the estate").

After Appellees filed a motion with the Bankruptcy Court seeking permission to sell their assets to Royal Scot free and clear of such liabilities, an objection to the motion was filed by Appellants—the 1992 UMWA Benefit Plan and its Trustees and the UMWA Combined Benefit Fund and its Trustees. The Plan and Fund contended that the Bankruptcy Court could not extinguish successor liabilities arising under the Coal Act. On the Plan and Fund's motion, the objection was withdrawn from the Bankruptcy Court's consideration by Judge Elizabeth V. Hallanan of the Beckley Division of the United States District Court for the Southern District of West Virginia. *See* 28 U.S.C. § 157(d) ("The district court shall, on

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[3] Leckie filed on April 16, 1993; New River filed on November 13, 1995; and Gould filed on November 17, 1995.

timely motion of any party, . . . withdraw a proceeding [from a bankruptcy court] if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.").

The District Court held that (1) based upon the meaning of the phrase "successor in interest" as it is used in one of the implementing regulations of the Internal Revenue Code, *see* 26 C.F.R. § 1.1503-2(c)(12), Royal Scot would not be Appellees' successor in interest within the meaning of the Coal Act because Royal Scot would not inherit Appellees' tax attributes merely by purchasing their assets; (2) Royal Scot therefore could not be held liable for Appellees' Coal Act obligations; and (3) section 363 (f)(1) of the Bankruptcy Code therefore authorized the Bankruptcy Court to permit the sale of Appellees' assets free and clear of their Coal Act obligations.[4] *See* 11 U.S.C. §363(f)(1) (stating that a trustee may sell property free and clear of an interest in that property when "applicable nonbankruptcy law" so permits). The court concluded by making the following observations:

> If the proposed sale between Defendants [Appellees] and the Buyer goes through, although the Buyer will not be contributing the Defendants' future obligations to the Funds, jobs will be created when the property is mined again and funds will be generated from which to pay some of Defendants' debts, including their past due Coal Act obligations. If the sale does not go through, no one will be in a position to contribute Defendants' future obligations to the Funds, no jobs will be created, and Defendants' debts will not be paid, at least not until Defendants' assets are sold in a piecemeal fashion, possibly generating less

[4] The district court also held that the proposed sale to Royal Scot was neither a bad-faith transaction within the meaning of section 363(m) of the Bankruptcy Code nor a "sham transaction" within the meaning of section 9722 of the Coal Act. The Plan and Fund have not appealed those rulings.

value than a sale such as this of all of Defendants' assets. The Court believes the lesser of these evils is the greater good.

On April 29, 1996, the District Court issued a supplemental order, ruling that its decision involved "a controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal may materially advance the ultimate termination of the litigation." *See* 28 U.S.C. § 1292(b).

On May 2, 1996, the Bankruptcy Court ruled that the terms of the proposed sale were "fair and reasonable" and authorized the sale of Appellees' assets free and clear of their Coal Act liabilities. Royal Scot, Appellees, the Fund, and the Plan have agreed that Appellees and Royal Scot will not close the sale until after the earlier of (1) fourteen days after the issuance of our opinion in the instant cases and (2) October 1, 1996.

B. *1992 UMWA Benefit Plan v. Lady H Coal Co.*

Appellees in the second of the two cases before us are the Lady H Coal Company, Inc., Consolidated Sewell, Inc., Sewell Coal Company, Leivasy Mining Corporation, and Eastwood Construction, Inc.[5] Appellees, each of whom operated coal mines in West Virginia, have filed voluntary petitions for bankruptcy relief under Chapter 11.[6] With respect to the 1992 UMWA Benefit Plan, the five debtors are the last signatory employers of approximately 150 retirees.

Appellees filed a motion with the Bankruptcy Court seeking permission to auction their property, with the buyer or buyers taking the property free and clear of liens and

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[5] Consolidated is the parent corporation of Lady H and Sewell. Leivasy and Eastwood are Lady H's subsidiaries.

[6] Lady H filed on July 20, 1994; Eastwood filed on November 7, 1994; Leivasy filed on December 2, 1994; and Consolidated and Sewell filed on December 22, 1994.

encumbrances. Objections to the motion were filed by Appellant, the 1992 UMWA Benefit Plan, and by the United Mine Workers of America, International.[7] The Plan contended that property cannot be sold in a bankruptcy auction free and clear of obligations arising under the Coal Act, and filed a motion to withdraw the matter from the Bankruptcy Court's consideration pursuant to 28 U.S.C. § 157(d). Chief Judge Charles H. Haden II, of the Charleston Division of the United States District Court for the Southern District of West Virginia, denied the motion to withdraw, but directed the Bankruptcy Court to submit proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157(c) concerning the Plan's objections to the proposed sale. The Bankruptcy Court did so on March 29, 1996.

Upon receiving the Bankruptcy Court's proposed findings, the District Court held that Judge Hallanan's opinion in *Leckie Smokeless* was "binding precedent and . . . resolve[d] the objections filed by the 1992 Plan" and overruled the Plan's objections accordingly. The court noted that, in its proposed conclusions of law, the Bankruptcy Court had reached a conclusion similar to that reached by Judge Hallanan, and ruled that, under principles of *stare decisis*, it should adopt the *Leckie Smokeless* reasoning. The court further stated, though, that, "[s]hould Judge Hallanan revisit her Order, or should that Order meet with less than full agreement from the Court of Appeals, the Court would adopt in the alternative [the Bankruptcy Court's] fine analysis." The Bankruptcy Court had suggested that, even if the purchasers of Appellees' assets would be Appellees' successors in interest, the Bankruptcy Court had the power under section 363(f)(5) of the Bankruptcy Code to issue a free and clear order absolving the purchasers of successor liabilities

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[7] The UMWA is not a party to the instant appeal. We therefore need consider neither the union's objections to the proposed auction nor the District Court's reasons for overruling those objections.

arising under the Coal Act. *See* 11 U.S.C. § 363(f)(5) (stating that a trustee may sell property free and clear of an interest in that property when the holder of the interest "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest").

On May 6, 1996, the District Court issued a supplemental order pursuant to section 1292(b), similar to the supplemental order that had been issued by the District Court in *Leckie Smokeless*.

On May 10, 1996, the Bankruptcy Court ruled that a bid of $4.5 million submitted by the Green Valley Coal Company was "fair and reasonable" and authorized the sale of Appellees' assets free and clear of their Coal Act obligations. The transaction was subsequently executed. The parties have placed a portion of the sale proceeds into an escrow account, the disposition of which depends upon the outcome of the instant appeal.

C. Consolidation of the Appeals

On June 18, 1996, after the Plan and Fund timely appealed the district courts' rulings, we issued an order consolidating the two cases, granting Appellants' request to make interlocutory appeals, and expediting those appeals. The Plan and Fund believe that the district courts lacked jurisdiction to authorize sales free and clear of Appellees' Coal Act liabilities, and that the district courts erred when they held that the purchasers of Appellees' assets would not become, by making such purchases, Appellees' successors in interest within the meaning of the Coal Act. The Plan also has taken the position that the District Court in *Lady H* erred when it held, in the alternative, that, even if the purchaser of the debtors' assets would become the debtors' successor in interest, the Bankruptcy Court could extinguish that successor liability by issuing a free and clear order pursuant to 11 U.S.C. § 363(f)(5).

III.

The Plan and Fund have argued that the district courts lacked subject matter jurisdiction to determine whether the purchasers of Appellees' assets could take those assets free and clear of Coal Act successor liabilities. They have rested that argument upon the following contentions: (1) that the Plan and Fund do not have "claims" within the meaning of section 101(5)(A) of the Bankruptcy Code; (2) that the eight debtors have not sought approval of the sale of assets free and clear of "interests in property" within the meaning of section 363(f) of the Code; and (3) that the district courts were asked to issue declaratory judgments that restrain the assessment and collection of taxes.[8]

A. *Claims*

The Bankruptcy Code defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured,

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[8] The Plan and Fund have also argued (1) that the debtors lacked standing to ask the courts to declare that the purchasers of their assets would not be jointly and severally liable for their Coal Act obligations and (2) that the issues raised in the instant appeals were not yet ripe for adjudication. Applying the standards articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (concerning standing), and *Charter Federal Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 (4th Cir. 1992) (concerning ripeness), *cert. denied*, 507 U.S. 1004 (1993), we have concluded that those arguments are without merit. With respect to standing, the debtors are confronted with the imminent loss of all or a portion of what the Bankruptcy Court has found to be fair and reasonable value for their assets; the cause of that imminent injury is the threat of Coal Act successor liability; and the imminent injury will be redressed if we affirm the district courts' rulings that the debtors' assets may be sold free and clear of the debtors' Coal Act liabilities. With respect to ripeness, no further factual developments are needed to determine whether the Bankruptcy Court may presently extinguish Coal Act successor liabilities, and prompt resolution of the bankruptcy proceedings requires that the successorship matter be resolved sooner, rather than later.

unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). By defining the term so broadly, Congress intended that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266.

The Plan and Fund have argued that, because future Coal Act premiums have not yet been assessed, liability for those premiums does not yet exist, the Plan and Fund therefore cannot now assert claims to those premiums, and the district courts therefore cannot now issue orders concerning liability for those premiums. Appellants rely principally upon the Second Circuit's decision in *LTV Steel Co.* and upon our decision in *River Place East Housing Corp. v. Rosenfeld* (*In re Rosenfeld*), 23 F.3d 833 (4th Cir.), *cert. denied*, —— U.S. ——, 115 S. Ct. 200 (1994). Finding both cases distinguishable, we reject Appellants' argument.

In *LTV Steel Co.*, the Second Circuit observed that "it is clear that the existence of a valid bankruptcy claim depends on (1) whether the claimant possessed a right to payment, and (2) whether that right arose before the filing of the petition." 53 F.3d at 497. The court then rejected the debtor coal operator's argument that its obligations to the Combined Benefit Fund "constitute[d] pre-petition debts which must . . . be disallowed because no timely proof of claim was filed." *Id.* at 496-97. The court held that the Fund did not have a pre-petition right to premium payments because (1) the Coal Act was not enacted until six years *after* the debtor filed its petition for bankruptcy relief and (2) "where the statute imposing the liability has not been enacted, it would be impossible to find even the remotest 'right to payment.'" *Id.* at 497 (internal quotation omitted). In the cases at bar, the Coal Act was enacted prior to the dates on which the

debtors filed for bankruptcy relief. Moreover, at the time those petitions were filed, it was established that, absent a change in the law, the debtors would be liable for future Coal Act premiums, the amount of which would be determined from time to time in accordance with the formulae described in the statute.

In *River Place*, we were asked to determine "whether a discharge in bankruptcy relieves a debtor from personal liability for post-petition assessments of cooperative housing dues." 23 F.3d at 835. We answered that question in the negative, holding that the cooperative association's claim "arose from (the debtor's) continued post-petition ownership of the property and not from a pre-petition contractual obligation." *Id.* at 837. In the instant cases, the debtors' liability for Coal Act premiums has arisen from their pre-petition, rather than their post-petition, acts.[9]

In accordance with Congress's desire that we interpret the term "claim" broadly, and in light of the statute's

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[9] The extent to which the debtors' liability for future Coal Act premiums was fixed at the time they filed their bankruptcy petitions—even though the amount of those premiums could not then and still cannot be precisely stated—is exemplified by the Coal Act's provisions concerning the effect of a coal operator's decision to leave the coal-mining industry on that operator's subsequent liability for Coal Act premiums. It appears that a coal operator remains liable for both Fund and Plan premiums even if it chooses to cease coal mining operators and to take up an entirely different enterprise. *See* 26 U.S.C. § 9701(c)(7) (defining "in business" as being engaged in any business activity, "whether or not in the coal industry"); *id.* § 9706(a) (stating that, with respect to the Fund, retirees are to be assigned to signatory operators that "remain[] in business"); *id.* § 9712(d) (stating that, with respect to the Plan, "all" last signatory operators are responsible for paying premiums); *Holland v. Double G Coal Co.*, 898 F. Supp. 351, 354-55 (S.D. W. Va. 1995) (observing that section 9712(d) does not expressly limit liability to operators that remain in business and concluding that "Congress must have intended section 9712 of the Coal Act to apply to all 1988 last signatory operators, whether or not they remain in business").

express indication that even unmatured and contingent rights to payment are to be regarded as claims, we hold that the Plan and Fund do have claims to future premium payments.

B. *Interests in Property*

Section 363(f) of the Bankruptcy Code authorizes the bankruptcy courts, under any one of five prescribed conditions, to authorize the sale of property "free and clear of any *interest in such property* of an entity other than the estate."[10] 11 U.S.C. § 363(f) (emphasis added). The Code does not define the kinds of interests in property that the statute is intended to encompass. The Plan and Fund have contended, though, that their respective interests in receiving premium payments are not within the scope of the statute:

> Coal Act obligations are not in the nature of an encumbrance on property of the debtor, nor are they enforceable through an *in rem action*, nor do they arise from ownership of property. Those obligations, therefore, cannot be subject to a free and clear sale under Section 363(f).

Appellants' Brief at 27.

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[10] In *Leckie Smokeless*, the District Court held that the first of the five alternative bases for issuing a free and clear order applied: the court held that nonbankruptcy law—namely, the Coal Act—permitted the sale of the debtors' assets free and clear of Coal Act liabilities. *See* 11 U.S.C. § 363(f)(1) (stating that a trustee may sell property free and clear of an interest in that property if "applicable nonbankruptcy law permits sale of such property free and clear of such interest"). In *Lady H*, the District Court found itself bound by the *Leckie Smokeless* decision. In the alternative, the *Lady H* court adopted the Bankruptcy Court's proposed finding that the debtors' property could be sold free and clear of the Plan's interest because the Plan "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." *See* 11 U.S.C. § 363(f)(5). The Plan has not appealed that aspect of the *Lady H* court's alternative ruling.

In *Leckie Smokeless*, citing *WBQ Partnership v. Virginia Dep't of Medical Assistance Servs.* (*In re WBQ Partnership*), 189 B.R. 97, 105 (Bankr. E.D. Va. 1995), the District Court stated that "[a] creditor has an 'interest in the property' of a debtor when he has a right to seek a future money payment from the debtor." Because the Fund and Plan have a right to seek Coal Act premiums from the debtors, the court concluded that the Fund and Plan have interests in the debtors' property. In *Lady H*, the District Court did not expressly address the issue; instead, it adopted the Bankruptcy Court's conclusion that the Plan has an interest in the debtors' property and that its claim for premiums would attach to the proceeds of the sale of that property.

Though courts have not yet settled upon a precise definition of the phrase "interest in such property," *see Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 730-32 (Bankr. N.D. Ind. 1996), we find that the District Court in *Leckie Smokeless* applied an unduly broad interpretation of the statute when it stated that one has an interest in a debtor's property simply when one has a right to demand money from the debtor. We have previously observed, for example, that "courts have recognized that general, unsecured claims do not constitute 'interests' within the meaning of § 363(f)." *Yadkin Valley Bank & Trust Co. v. McGee (In re Hutchinson)*, 5 F.3d 750, 756 n.4 (4th Cir. 1993); *see also Ninth Ave. Remedial Group*, 195 B.R. at 729-32 (observing that a few courts have held that section 363(f) applies only to *in rem* interests, while numerous other courts have interpreted the statute more broadly, applying it, for example, to product liability and employment discrimination claims). Yet while the plain meaning of the phrase "interest in such property" suggests that not all general rights to payment are encompassed by the statute, Congress did not expressly indicate that, by employing such language, it intended to limit the scope of section 363(f) to *in rem* interests, strictly defined, and we decline to

adopt such a restricted reading of the statute here. *Accord P.K.R. Convalescent Centers v. Commonwealth of Virginia, Dep't of Medical Assistance Servs. (In re P.K.R. Convalescent Centers)*, 189 B.R. 90, 92-94 (Bankr. E.D. Va. 1995) (holding that section 363(f) permitted a sale free and clear of Virginia's depreciation-recoupment interest in the debtor's property, even though that interest was unsecured by lien or otherwise). *Contra Fairchild Aircraft Corp. v. Cambell (In re Fairchild Aircraft Corp.)*, 184 B.R. 910, 917-19 (Bankr. W.D. Tex. 1995) (holding that section 363(f) applies only to "*in rem* interests which have attached to the property," by way of either "the debtor's consent to a security interest or the creditor's attachment of the property resulting in a lien").

It is difficult to make further categorical observations concerning the intended meaning of the words "interest in"—indeed, the precise boundaries of the phrase likely will be defined only as the courts continue to apply it to the facts presented in the cases brought before them. Yet we hold that the Fund's and Plan's rights to collect premium payments from Appellees constitute interests in the assets that Appellees now wish to sell, or have sold already. Those rights are grounded, at least in part, in the fact that those very assets have been employed for coal-mining purposes: if Appellees had never elected to put their assets to use in the coal-mining industry, and had taken up business in an altogether different area, the Plan and Fund would have no right to seek premium payments from them. Because there is therefore a relationship between (1) the Fund's and Plan's rights to demand premium payments from Appellees and (2) the use to which Appellees put their assets, we find that the Fund and Plan have interests in those assets within the meaning of section 363(f).[11]

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[11] We emphasize, though, that the question of whether the Plan and Fund have interests in the debtors' property within the meaning of the Bankruptcy Code is distinct from the question of whether

C. *Declaratory Judgments and Injunctions*

The Plan and Fund have argued that the district courts were stripped of subject matter jurisdiction by both the Anti-Injunction Act, 26 U.S.C. § 7421, and the tax-exclusion provision of the Declaratory Judgment Act, 28 U.S.C. § 2201.

The Declaratory Judgment Act authorizes all United States courts to issue declaratory relief in cases within their jurisdiction "except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986 [or] a proceeding under section 505 or 1146 of title 11." 28 U.S.C. § 2201(a). The Anti-Injunction Act states that, with certain exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a).

As a preliminary matter, we note that the tax-exclusion provision of the Declaratory Judgment Act cannot be regarded as a jurisdictional bar, *per se,* because "[t]he Act does not itself confer subject matter jurisdiction, but, rather, makes available an added anodyne for disputes that come within the federal courts' jurisdiction on some other basis." *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 534 (1st Cir. 1995); *accord Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950). We will therefore proceed under the assumption that Appellants believe that the Anti-Injunction Act posed a jurisdictional bar, while the Declaratory Judgment Act prohibited the issuance of declaratory relief.

To determine whether the two statutes apply in the instant cases, we must first determine whether Coal Act

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third parties become the debtors' successors in interest within the meaning of the Coal Act upon purchasing that property. We express no opinion concerning the latter inquiry.

premiums are taxes. We hold that they are. In *United States v. City of Huntington, W. Va.*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 1048 (1994), we ascertained whether a service fee imposed by a city was a tax by asking whether it had each of four features: "(a) An involuntary pecuniary burden, regardless of name, laid upon individuals or property; (b) Imposed by or under authority of the legislature; (c) For public purposes, including the purposes of defraying expenses of government or undertakings authorized by it; (d) Under the police or taxing power of the state." *Id.* at 73 nn.4 & 5 (quoting *County Sanitation Dist. No. 2 of Los Angeles County v. Lorber Industries of California (In re Lorber Industries of California)*, 675 F.2d 1062, 1066 (9th Cir.1982)); *accord Williams v. Motley*, 925 F.2d 741, 742 (4th Cir. 1991) ("In the absence of a statutory definition, the Supreme Court has defined taxes as 'pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it.' ") (quoting *City of New York v. Feiring*, 313 U.S. 283, 285 (1941)). Applying that four-part test, the Second Circuit in *LTV Steel Co.* held that Coal Act premiums are taxes within the meaning of a priority provision of the Bankruptcy Code: they are involuntary pecuniary burdens imposed by Congress for the public purpose of restoring financial stability to coal miners' benefit plans, and those burdens have been imposed as an exercise of Congress's taxing power.[12] 53 F.3d at 498. Finding the Second Circuit's reasoning persuasive, and discerning no basis for distinguishing the meaning of the word "tax" in the Bankruptcy Code from the use of that term in the two statutes at issue before us, we adopt the Second Circuit's reasoning as our own.

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[12] With respect to the last of the four elements, the court pointed out that the Coal Act was enacted as an amendment to the Internal Revenue Code of 1986 and that Congress conferred enforcement powers upon the Secretary of the Treasury. 53 F.3d at 498; *see* 26 U.S.C. § 9707(d)(1).

We must next determine whether the Anti-Injunction Act or the Declaratory Judgment Act barred the district courts from issuing the orders challenged here. We hold that they did not.

Though the Anti-Injunction Act concerns federal courts' subject matter jurisdiction and the tax-exclusion provision of the Declaratory Judgment Act concerns the issuance of a particular remedy, the two statutory texts are, in underlying intent and practical effect, coextensive. *Wyoming Trucking Ass'n v. Bentsen*, 82 F.3d 930, 932-33 (10th Cir. 1996) [13]; *Perlowin v. Sassi*, 711 F.2d 910, 911 (9th Cir. 1983) (per curiam) (stating that "[i]f [a] suit is allowed under the Anti-Injunction Act, it is not barred by the Declaratory Judgment Act"); *Investment Annuity, Inc. v. Blumenthal*, 609 F.2d 1, 4 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 981 (1980); *Tomlinson v. Smith*, 128 F.2d 808, 811 (7th Cir. 1942). The tax-exclusion provision was in fact added to the Declaratory Judgment Act in order to reaffirm the restrictions declared in the Anti-Injunction Act, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974), and to prevent taxpayers from "us[ing] the Declaratory Judgment Act to do what they were prohibited from doing under the Anti-Injunction Act," *Eastern Kentucky Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1285 n.11 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976); *see also Alexander v. "Americans United" Inc.*, 416 U.S. 752, 759 n.10 (1974) (observing that the District of Columbia Circuit had held that the two provisions are coterminous, declining to pass judgment on that holding, but conceding that "the federal tax exception to the Declaratory Judgment Act is at least as broad as the prohibition of the Anti-Injunction Act"). The purposes of the two statu-

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[13] The Tenth Circuit stated that finding the two provisions coextensive "is consistent with common sense, since an injunction of a tax and a judicial declaration that a tax is illegal have the same prohibitory effect on the federal government's ability to assess and collect taxes." *Wyoming Trucking Ass'n*, 82 F.3d at 933.

tory provisions are to allow the Federal Government to assess and collect allegedly due taxes without judicial interference and to compel taxpayers to raise their objections to collected taxes in suits for refunds. *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7 (1962) (concerning the Anti-Injunction Act); *Flora v. United States*, 362 U.S. 146, 164 & n.29 (1960) (concerning the Declaratory Judgment Act). In light of the two provisions' coextensive nature, a finding that one of the two statutes does not bar the debtors in the instant cases from seeking and obtaining free and clear orders will necessitate a finding that the other statute does not pose an obstacle either.

In *South Carolina v. Regan*, 465 U.S. 367 (1984), the Supreme Court was asked to determine whether the Anti-Injunction Act barred the State of South Carolina from seeking injunctive and other relief in a suit challenging the constitutionality of a provision of the Internal Revenue Code that imposed a tax on interest earned from bearer bonds. *Id.* at 370-71. The Court held that the Anti-Injunction Act "was not intended to bar an action where . . . Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax." *Id.* at 373. The Court observed that the statute has no recorded legislative history, but found that "the circumstances of its enactment strongly" supported the Court's finding: the Court observed that an earlier version of the statute provided an alternative legal avenue for challenging taxes—namely, a suit for a refund. *Id.* at 373. The Court further noted that, in cases in which it had held that the Anti-Injunction Act barred a suit, the taxpayers could have paid the disputed sums and then sued for refunds, and that it had previously declared that one of the central purposes of the Act was "to require that the legal right to . . . disputed sums be determined in a suit for refund." *Id.* at 374-76 (quoting *Williams Packing Co.*, 370 U.S. at 7). The Court then held that, because the challenged tax would be imposed on bondholders, rather than on South Carolina, and because the State would have

no direct means of challenging that tax, the Anti-Injunction Act did not bar the suit. *Id.* at 378-80.

In the cases at bar, we find that the debtors do not have any "alternative legal way" to challenge the imposition of Coal Act successor liability on the purchasers of their assets and that, consequently, neither the tax-exclusion provision of the Declaratory Judgment Act nor the Anti-Injunction Act barred the district courts from reaching the merits of the cases and ordering the appropriate relief. The debtors in the cases before us are, in many respects, in the same position that the State of South Carolina occupied in *Regan*: they need to know, not whether they can themselves be held liable for particular taxes, but whether those taxes can be assessed against a third party. More specifically, the debtors need to know whether they can sell their assets free and clear of liability for their Coal Act premiums (while in no way thereby avoiding liability for those premiums themselves), so that, in the case of the *Leckie Smokeless* debtors, they can meet an absolute condition of purchase imposed by Royal Scot or, in the case of the *Lady H* debtors, they can gain the right to have escrowed funds added to the value of their bankruptcy estates. The debtors cannot themselves pay all Coal Tax premiums owed, whether already accrued or yet to be assessed, then challenge the imposition of joint and several liability on third parties, the purchasers of their assets. Nor does the Coal Act itself provide any means by which a coal operator can challenge the imposition of successor liability on a third party.

The Plan and Fund disagree, pointing out that the debtors have always had the right to challenge their monthly and annual Coal Act assessments, and that the purchasers of their assets can bring similar challenges if joint and several liability is imposed upon them for the debtors' Coal Act obligations. *See, e.g.*, 26 U.S.C. § 9706 (f) (stating that an operator may ask the Commissioner of Social Security to review the assignment of a beneficiary

to it). The Plan and Fund have misapprehended the nature of the orders sought by the debtors. The debtors have not disputed their own Coal Act liabilities; instead, they require a determination of whether, in an attempt to generate funds with which to pay at least a portion of their obligations to the Plan, the Fund, and their other creditors, they can sell their assets free and clear of those liabilities.

We therefore find that the district courts had jurisdiction to reach the merits of the debtors' motions to sell their assets free and clear of their Coal Act obligations and had the authority to provide the necessary relief.

IV.

The Coal Act imposes liability for Plan premiums upon "last singatory operators" and their "related persons" and "successors in interest." 26 U.S.C. §§ 9711(g)(1), 9712(d). The Act imposes liability for Fund premiums upon "assigned operators" and their "related persons" and "successors in interest." *Id.* §§ 9701(c)(2), 9704(a). The Act does not define the phrase "successor in interest."

The courts below determined that the purchasers of Appellees' assets would not be Appellees' successors in interest within the meaning of the Act.[14] We need not and do

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[14] They reached that conclusion by reasoning as follows. The Coal Act was enacted as an amendment to the Internal Revenue Code of 1986. *See* Pub. L. No. 102-486, 106 Stat. 2776, 3037. In the Code's implementing regulations, the term "successor in interest" is defined as "an acquiring corporation that succeeds to the tax attributes of an acquired corporation by means of a transaction subject to" another provision of the Code. 26 C.F.R. § 1.1503-2(c)(12). Purchasers of assets in bankruptcy do not always succeed to the tax attributes of the sellers. Consequently, the purchasers of Appellees' assets cannot be Appellees' succesors in interest within the meaning of the Coal Act and so cannot be held liable for Appellees' Fund and Plan premiums.

Though we note that the Code's implementing regulations contain several definitions of the phrase "successor in interest," *see, e.g.*, 26 C.F.R. § 1.367(e)-1(c)(8)(vi)(B) (providing the definition that

not now resolve the matter, having concluded that, even if Royal Scot would be, and Green Valley is, a successor in interest,[15] the Bankruptcy Court may extinguish Coal Act successor liability pursuant to 11 U.S.C. § 363(f)(5).

Section 363(f)(5) states that a trustee may sell property free and clear of another entity's interest in that property if "such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." In *Lady H*, the District Court, ruling in the alternative, adopted the Bankruptcy Court's proposed finding that the Plan could be required to accept such satisfaction of its interest. The Plan has not appealed that aspect of the District Court's reasoning, and we perecive no grounds for disturbing that ruling *sua sponte*.[16] Moreover, we find that the District Court's reasoning applies with equal force to the Fund's and Plan's objections to the *Leckie* Smokeless debtors' motion to sell, and so

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is to be applied when dealing with nonrecognition of gains under particular circumstances); *id.* § 7.367(b)-(12)(b) (providing the definition that is to be applied when dealing with particular kinds of exchanges between foreign and domestic corporations); *id.* § 301.6110-2(i) (providing the definition that is to be applied when dealing with public inspection of written determinations issued by the Internal Revenue Service), and though we note that section 1.1503-2(c)(12), the regulation relied upon by the district courts, provides the definition that is to be applied "for purposes of th[at] section"—a section dealing with dual consolidated losses, a matter having no apparent relevance to the issues raised in the cases at bar—we need not and do not here decide whether the district courts applied the definition contemplated by Congress.

[15] Should the successorship issue arise in a future case brought before us, we may then have to determine whether the last two words in the phrase "successor in interest" are meaningless or redundant.

[16] With respect to the task of determining the amount of such satisfaction, for example, we have noted that bankruptcy courts may "estimate[] . . . any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case." 11 U.S.C. § 502(c)(1).

dispose of their appeal of the District Court's opinion in that case accordingly.

The Plan and Fund have raised several objections to the conclusion we have reached. First, they have argued that Coal Act premiums are taxes and that liability for future, unassessed taxes cannot be extinguished pursuant to a free and clear order. In support of that contention, the Plan and Fund have cited *LTV Steel Co.*, 53 F.3d at 496-98; *Michigan Employment Sec. Comm'n v. Wolverine Radio Co.* (*In re Wolverine Radio Co.*), 930 F.2d 1132, 1147-48 (6th Cir. 1991), *cert. dismissed*, 503 U.S. 978 (1992); *Holly's, Inc. v. City of Kentwood* (*In re Holly's, Inc.*), 172 B.R. 545, 562 (Bankr. W.D. Mich. 1994); and *In re Maley*, 152 BR. 789, 792 (Bankr. W.D.N.Y. 1992). While we agree that Coal Act premiums are taxes, we find no legal basis for Appellants' argument that, as a general matter, property cannot be sold to an unrelated third party free and clear of a debtor's future tax obligations. We have noted, in this regard, that the Code itself articulates no such restriction; that Congress has given no indication that bankruptcy courts cannot order property sold free and clear of interests that Congress has itself created by statute; and that none of the four cases cited by Appellants supports their contention.[17]

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[17] In *LTV Steel Co.*, the Second Circuit was asked to resolve two statutory issues: whether a debtor could itself be relieved of its Coal Act obligations due to the Fund's failure to file a timely proof of claim, where the debtor had filed for bankruptcy relief six years before the Coal Act was enacted, and whether Coal Act premiums are taxes and therefore entitled to administrative priority pursuant to 11 U.S.C. § 503(b)(1)(B). *See* 53 F.3d at 496-98. The case in no way dealt with whether Coal Act successor liability may be extinguished pursuant to section 363(f).

In *Wolverine Radio Co.*, the Sixth Circuit was asked to determine whether the Michigan Employment Security Commission could apply the debtor's tax rating to the debtor's successor despite the fact that a free and clear order had been entered. *See* 930 F.2d at 1134-35. The court held that it could, finding that the tax rating was not an "interest in property" within the meaning of section

Second, the Plan and Fund have argued that they possess neither "claims" nor "interests in property" within the meaning of the Bankruptcy Code. We have rejected those contentions, *supra*.

Third, the Plan and Fund have contended that, by allowing the Bankruptcy Court to order the sale of the debtors' assets free and clear of the debtors' Coal Act obligations, the District Court in *Lady H* has granted purchasers in bankruptcy settings a windfall: while such purchasers might have been liable for debtors' Coal Act obligations if the sales had not occurred in bankruptcy settings, they are permitted to escape those obligations if they insist that the debtors obtain free and clear orders.[18] We reject that argument, finding that it is our duty to enforce the statutory scheme that Congress has erected.

Finally, the Plan and Fund have argued that, by allowing bankruptcy courts to declare that the purchasers of coal operators' assets take those assets free and clear of the operators' Coal Act obligations, the District Court in *Lady H* has set the stage for the same kind of funding crisis that prompted the enactment of the Coal Act.

363(f), *id.* at 1146-47; that none of the five conditions under which a free and clear order may be issued had been met with respect to the tax rating, *id.* at 1147 n.24; and that the successor's tax liability arose only as a result of its own post-petition employment of workers, *id.* at 1149. The instant cases are distinguishable on each of those three grounds.

The decisions in *Holly's, Inc.* and *In re Maley* are far afield from the issues raised in the cases at bar. In those cases, the bankruptcy courts merely held that they lacked subject matter jurisdiction to determine the debtors' post-petition tax liabilities. *See Holly's, Inc.*, 172 B.R. at 562; *In re Maley*, 152 B.R. at 791-92. In the cases at bar, the debtors have not challenged their own Coal Act liabilities.

[18] That argument rests, of course, upon the assumption that an entity becomes a coal operator's successor in interest merely by purchasing its assets. Again, we here express no opinion concerning that matter.

Though we are cognizant of the Plan's and Fund's concerns, we find their argument insufficiently persuasive to disturb the statutory scheme as we have found it. First, the Plan's and Fund's concerns are probably most appropriately addressed to Congress. Second, it might very well be that, at least in circumstances such as those presented in the cases at bar, a rule permitting the issuance of free and clear orders protects the Fund's and Plan's interests more effectively than a contrary rule. In *Leckie Smokeless*, for example, the Bankruptcy Court found that $1.9 million represented a fair and reasonable price for the debtors' assets; the debtors' accrued Coal Act obligations, though, stand at about $7 million. If a free and clear order could not be issued, the assets would almost inevitably have to be sold piecemeal, thereby generating fewer funds with which to satisfy the claims of the Fund, the Plan, and the debtors' other creditors.

We have reviewed Appellants' remaining arguments and find them to be equally without merit.

V.

For the foregoing reasons, we sustain the district courts' decisions to overrule the Plan's and Fund's objections to the sale of Appellees' assets free and clear of Appellees' Coal Act obligations.

AFFIRMED

APPENDIX B

[Entered Apr. 16, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
AT BECKLEY

Civil Action No. 5:96-0092

UMWA 1992 BENEFIT PLAN AND ITS TRUSTEES, AND
THE UMWA COMBINED BENEFIT FUND AND
ITS TRUSTEES,

Plaintiffs,

v.

LECKIE SMOKELESS COAL COMPANY,
NEW RIVER MINERAL RESOURCES COMPANY,
and GOULD RESOURCES, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court via Objection of the UMWA Combined Fund and 1992 Benefit Plan to Debtors' Motion to Approve Bidding and Auction Procedures and to Approve Option and Asset Purchase Agreement and Assumption and Assignment of Executory Contracts and Leases ("Plaintiffs' Objection").

Defendants' Joint Motion for Entry of an Order Approving Bidding and Auction Procedures and an Order Approving Auction and Asset Purchase Agreement and Assumption and Assignment of Executory Contracts and Leases ("Motion to Sell") is currently pending before the United States Bankruptcy Court for the Southern District of West Virginia. By Order entered March 13,

1996 this Court withdrew reference of Plaintiffs' Objections pursuant to 28 U.S.C. § 157(d) and by Order of March 26, 1996 directed the parties to brief the issue of the effect of a free and clear order under 11 U.S.C. § 363(f) on successor liability under the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"), 26 U.S.C. § 9701, *et seq.*

In response to the Court's May 26, 1996 Order and briefing schedule, Plaintiffs submitted Plaintiff Coal Act Funds' Brief Supporting Objection to Leckie's Sale Motion ("Plaintiffs' Brief"), and Defendants submitted a Memorandum of Debtors Leckie Smokeless Coal Company, New River Mineral Resources Company and Gould Resources, Inc. in Response to the Objection of UMWA 1992 Benefit Plan and UMWA Combined Benefit Fund to Debtors' Motion to Approve Bidding and Auction Procedures, and to Approve Option and Asset Purchase Agreement and Assumption and Assignment of Executory Contracts and Leases ("Defendants' Brief"). Plaintiffs also submitted Plaintiff Coal Act Funds' Response Brief, Supporting Objection to Sale ("Plaintiffs' Response"), and Defendants simultaneously submitted a Reply Memorandum of Debtors Leckie Smokeless Coal Company, New River Mineral Resources Company and Gould Resources, Inc. in Reply to Plaintiff's [sic] Coal Act Funds' Brief Supporting Objection to Leckie Smokeless Coal Company's Sale Motion ("Defendants' Response") which Royal Scot Minerals, Inc., the prospective buyer in the sale pending before the Bankruptcy Court, joined. Having carefully considered said briefs and responses and the exhibits attacted thereto the Court is now prepared to rule upon Plaintiffs' Objection.

I. Facts

A. *Leckie, Gould and New River*

Defendant Leckie Smokeless Coal ("Leckie"), in business since 1919, operated two deep mines and one surface mine in Rupert, West Virginia. Defendants New River

Mineral Resources ("New River") and Gould Resources, Inc. ("Gould") are affiliates of Leckie's. Their primary assets are leases of coal lands adjacent to Leckie's property. Neither Gould nor New River has engaged employees to mine coal, although Gould has periodically hired contract miners. (Motion to Sell, ¶ 7.)

B. *The Funds*

Plaintiffs are the Trustees of the UMWA 1992 Benefit Plan ("the 1992 Plan") and the Trustees of the UMWA Combined Benefit Fund ("the Combined Fund") (collectively "the Funds"). The Funds were created pursuant to the Coal Act which was signed into law on October 24, 1992 as subtitle C to the Energy Policy Act of 1992, in the form of amendments to the Internal Revenue Code and the Surface Mining Act, Pub. L. No. 102-486. The Coal Act was enacted in response to a crisis in the coal industry over retirees' health benefits. Prior to the Coal Act, collectively bargained multiemployer benefit plans provided health care benefits to most retired miners. However, as coal companies went out of business and more coal industry employees retired, these employees were dumped into the existing multiemployer benefit plans whose contributors were diminishing, creating an escalating burden on the plans which lacked adequate mechanisms to ensure continuing employer contributions.

The Coal Act became effective February 1, 1993. It created the Combined Fund to cover beneficiaries eligible for and receiving retiree health benefits under the UMWA's former 1974 and 1950 Benefit Plans. 26 U.S.C. §§ 9702(a), 9703(f). Those retirees who are not eligible for the Combined Fund receive benefits directly from their last employer who was a signatory to the National Bituminous Coal Wage Agreement ("NBCWA") or "last signatory employer." 26 U.S.C. § 9711(a)-(b). The 1992 Plan covers those retirees not eligible for the Combined Fund and who are not receiving benefits directly from their last signatory employer. 26 U.S.C. § 9712(b).

To finance the Combined Fund, the Coal Act imposes on "assigned operators" and their related persons under 26 U.S.C. § 9704(a) statutory obligations to contribute monthly per beneficiary premiums. Pursuant to 26 U.S.C. § 9706, the Secretary of Health and Human Services sets the number of beneficiaries assigned to each operator and their related persons. The monthly per beneficiary premium is set according to a formula prescribed pursuant to 26 U.S.C. § 9704(b)(2). It is currently $183.38 per beneficiary per month. (Exhibit 1 to Plaintiffs' Brief ("Exhibit 1"), p. 2.)

The 1992 Plan is also funded by per beneficiary premiums, based on a rate set by the 1992 Plan's Trustees. 26 U.S.C. §§ 9712(d)(1)(B), (d)(2)(A). The Trustees for the 1992 Plan determine each beneficiary's last signatory employer defined as the "operator which was the most recent coal industry employer of such retiree." 26 U.S.C. § 9712(d)(1)(B). The Trustees then adjust the beneficiary count and premiums for each assigned operator and their related persons on a monthly basis dependent on the number of eligible beneficiaries attributable to each employer. The basic premium rate is recalculated annually based on the costs of health care. The current per beneficiary premium for the 1992 Plan is $235. (Exhibit 1, p. 2.)

There are 140 beneficiaries assigned to Defendants under the Combined Fund and 87 beneficiaries attributable to Defendants as their last signatory employer under the 1992 Plan. (Exhibit 1, pp. 1-2.) Thus, there are 227 beneficiaries for whom Defendants are responsible for paying per beneficiary premiums to the Funds under the Coal Act. In the instant bankruptcy case, Plaintiffs have filed Proofs of Claim for a total of $1,414,211.24 for delinquent contributions and premiums for pension and benefits due under the Coal Act, the NBCWA and ERISA. (Exhibit F to Defendants' Brief ("Exhibit F"). Defendants

assert that their "total Coal Act liability will easily exceed $7,000,000." (Defendants' Brief, p. 8.)

C. *History of these Proceedings*

1. *Bankruptcy*

All three defendants have filed voluntary petitions for bankruptcy under Chapter 11 of the Bankruptcy Code. On April 16, 1993 Leckie filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. New River filed under Chapter 11 on November 13, 1995 and Gould followed shortly thereafter, filing its voluntary petition for bankruptcy under Chapter 11 on November 17, 1995. When Leckie filed for bankruptcy, its assets consisted of mining equipment, mining permits, an operational preparation plant, leasehold interests and 2,000 acres of land. (Defendants' Brief, p. 3.) At that time Leckie had over 150 employees. Leckie kept up its payments to the Funds until January of 1994 when it ceased active mining operations and terminated most of its employees. Shortly after Leckie ceased mining there was a fire at its preparation plant, rendering the plant inoperable. (Defendants' Brief, pp. 3-4.)

For the past two years Joseph C. Turley, III, President of the three defendants, has been attempting to sell Defendants' assets pursuant to 11 U.S.C. §§ 363 and 365. Royal Scot Minerals, Inc. (the Buyer), an entity unrelated to Defendants (Motion to Sell, ¶ 20), has offered to purchase Defendants' assets for approximately $1.9 million ($1.5 million for Leckie's property, $272,500 for New River's property and $156,750 for Gould's property). (Motion to Sell, ¶ 11.) Defendants seek to have the Bankruptcy Court approve an Option and Purchase Agreement among the Buyer and Defendants. (Exhibit A to Motion to Sell.) The Bankruptcy Court entered an Interim Order Approving Bidding and Auction Procedures and Scheduling Order Setting Forth Notice Requirements for Hearing

on Debtors' Joint Motion Seeking Approval of Option and Asset Purchase Agreement. Plaintiffs filed the instant Objection to Defendants' Motion to Sell. Because Plaintiffs' Objection required consideration of non-bankruptcy law, namely the Coal Act, withdrawal of reference of Plaintiffs' Objection was mandatory pursuant to 28 U.S.C. § 157(d). Following this Court's ruling on Plaintiffs' Objection, the Bankruptcy Court will conduct a confirmation hearing on Defendants' Motion to Sell.

2. *Defendants' Motion to Sell*

> Debtors and Buyer require as a condition of the sale under the Option Agreement that the order approving the Option Agreement provide that the Buyer is not assuming nor shall it in any way as a successor or otherwise, be liable for any liabilities, debts or obligations of the Debtors or any liabilities, debts or obligations in any way whatsoever relating to or arising from the Debtors' ownership or operation of the Property prior to closing or any liabilities calculable by reference to the Debtors or their assets or operations, or relating to continuing conditions existing on or prior to closing, which liabilities, debts, obligations shall be extinguished insofar as they may give rise to successor liability, without regard to whether the claimant asserting any such liabilities, debts or obligations has deliver to the Buyer a release thereof. Without limiting the generality of the foregoing, it is also a condition of the sale that the order provide that the Buyer shall not be liable or responsible, as a successor or otherwise, for the Debtors liabilities, debts or obligations, whether calculable by reference to the Debtors or its operations, or under or in connection with . . . (ii) any . . . employee benefit plans . . . [or] (v) . . . claims arising under . . . the Coal Industry Retiree Health Benefit Act of 1992 . . . .

(Motion to Sell, ¶ 13.)

> The Debtors and Buyer further require as a condition of sale that the Property transferred under the Option Agreement shall be conveyed to the Buyer free and clear of any and all claims, liens, pledges, offsets, set-offs, recoupments, charges and successor, product, environmental, tax and other liabilities . . . . and that all rights of lienholders holding valid, enforceable and perfected liens shall attach to the proceeds generated from sale of the Property.

(*Id.* at ¶ 14.)

Thus, Defendants seek "this Court's approval of an . . . Option Agreement . . . under which substantially all of the assets of Leckie, New River, and Gould would be approved for sale free and clear of successor liability under the . . . Coal Act." (Plaintiffs' Objection, pp. 1-2.)

3. *Objection*

Plaintiffs' Objection to Defendants' Motion to Sell addresses the issue of the Buyer's successor liability for obligations imposed under the Coal Act. As Plaintiffs frame the issue, "the Court must determine whether, in approving a sale of assets under section 363(f) of the Bankruptcy Code, a bankruptcy court has the authority to extinguish any further liability a purchaser might otherwise have as a successor under the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. § 9701, *et seq.*" (Plaintiffs' Brief, pp. 1-2.)

Plaintiffs contend that a purchaser of assets, even a purchaser out of bankruptcy, is liable for a debtor's obligations under the Coal Act as a successor. (Plaintiffs' Brief, pp. 14-18.) Plaintiffs also contend that a "free and clear" order under § 363(f) of the Bankruptcy Code cannot insulate the Buyer from Coal Act liability because Plaintiffs' interest in this matter is not an "interest in property" as required by § 363(f) (*Id.* at pp. 22-23) or a "claim" (Plaintiff's Response, pp. 3-10), that under

§ 524(e) of the Bankruptcy Code, discharge of a debtor does not affect the liability of any other entity on such a debt (Plaintiffs' Brief at pp. 24-26), and, finally, that the relief requested by Defendants is in violation of § 9722 of the Coal Act because its principle purpose is an impermissible effort to avoid liability under that Act. (*Id.* at pp. 27-28.)

Defendants argue that under the Coal Act, the Buyer in this case "is not and cannot be a 'successor in interest' and thus, will not be liable to the Funds for Leckie's liability." (Defendants' Brief, p. 9.) Alternatively, Defendants argue that "if the Court determines that the Funds have an interest which attaches to the Debtors' assets, the Funds' objection must be overruled because the Bankruptcy Code permits the Debtors to sell their assets free and clear of such interests and claims." (*Id.*) Defendants also argue that § 524(e) of the Bankruptcy Code dealing with discharge of a debtor is irrelevant to this action because under the proposed sale Defendants will not receive a discharge. Rather their obligations will be payable from the sale proceeds. (*Id.* at p. 26.) Finally, Defendants argue that under the applicable case law, the proposed sale is not a "sham transaction" under § 9722 of the Coal Act because its principle purpose is not to avoid or evade liability under the Act. (*Id.* at pp. 26-28.)

II. Applicable Law

A. *The Coal Act*

> The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.

26 U.S.C. § 9701(c)(1).

> A person shall be considered to be a related person to a signatory operator if that person is—
>
> > (i) a member of a controlled group of corporations . . . which includes a signatory operator;

> (ii) a trade or business which is under the common control . . . which such a signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> *A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).*

26 U.S.C. § 9701(c)(2)(A) (emphasis added).

> The term "assigned operator" means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

26 U.S.C. § 9701(c)(5).

> Each assigned operator shall pay to the Combined Funds for each plan year beginning on or after February 1, 1993, an annual premium . . . . Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

26 U.S.C. § 9704(a).

> If a person becomes a *successor* of an assigned operator after the enactment date, the assigned operator *may* transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such successor shall be treated as the assigned operator with respect to such beneficiary for purposes of this chapter. Notwithstanding the preceding sentence,

the assigned operator transferring such assignment (and any related person) shall remain the guarantor of benefits provided to the eligible beneficiary under this chapter.

26 U.S.C. § 9706(b)(2) (emphasis added).

For the purposes of this part and part II—

(1) Successor.—The term "last signatory operator" shall include a *successor in interest* of such operator.

(2) Reassignment upon purchase.—If a person becomes a *successor* of a last signatory operator after the enactment date, the last signatory operator *may* transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter.

26 U.S.C. § 9711(g) (emphasis added).

A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to such an operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

26 U.S.C. § 9712(d)(4).

If a principal purpose of any transaction is to evade or avoid liability under this chapter, this chapter shall be applied (and such liability shall be imposed) without regard to such transaction.

26 U.S.C. § 9722.

B. *The Bankruptcy Code*

"[C]laim" means—

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . .

11 U.S.C. § 101(5).

> The court may issue any order, process, or judgment that is necessary and appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to implement court order or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in property of the entity other than the estate, only if—
>
> (1) applicable, non-bankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which the property is to be sold is greater than the aggregate value of such interest;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

> Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

11 U.S.C. § 524(e).

C. *Internal Revenue Regulations*

> *Successor-in-interest.* The term "successor-in-interest" means an acquiring corporation that succeeds to the tax attributes of an acquired corporation by means of a transaction subject to section 381.

26 C.F.R. § 1.1503-2(c)(12).

> [T]he term successor in interest refers to—
>
> > (1) Any corporation that acquires the assets of the distributing or controlled corporation (or a succesor in interest) in a transaction in section 381(a) to which this paragraph (c)(3)(vi) applies;
> >
> > (2) Any corporation that acquires the stock or securities of the distributing or controlled corporation (or a successor in interest) in a transaction to which this paragraph (c)(3)(vi) applies;
> >
> > (3) Any corporation whose stock or securities are exchanged for the stock or securities of the distributing or controlled corporation (or a successor in interest) in a transaction described in section 351, 354 or 356 to which this paragraph (c)(3)(vi) applies.

26 C.F.R. 1.367(e)(1)(c)(vi)(B). 26 U.S.C. § 381 addresses carryovers in certain corporate acquisitions, namely tax-free reorganizations and liquidations. In such acquisitions, a corporation acquiring the assets of another corporation succeeds to the tax attributes of the latter

corporation. 26 U.S.C. §§ 351, 354 and 356 also address situations in which a corporation acquires the assets of a selling corporation in a tax-free exchange and the purchaser takes on a carryover, not a fair market, basis. Thus, "successor in interest" under these sections of the Internal Revenue Code refers to a purchaser of assets who inherits the tax attributes of the seller.

III. Discussion

A. *Royal Scot is Not a "Successor in Interest"*

As Plaintiffs correctly state, "[t]he Court cannot eliminate potential future successor liability.". (Plaintiffs' Brief, p. 15.) The Coal Act provides that successors are jointly and severally liable for the obligation to provide coal industry retirees with health care. 26 U.S.C. §§ 9701(c)(2), 9704(a), 9711(c), 9711(g), 9712(d)(4). However, Plaintiffs' corollary to this proposition is faulty. Plaintiffs state that, given joint and several successor liability and "the relief sought [by Defendants], the Court need not consider whether the purchaser is a successor or not." (Plaintiffs' Brief, pp. 15-16.) What is sought by Defendants is to relieve the Buyer of Defendants' Coal Act obligations. The only way the Buyer can be so relieved is if the Buyer is not determined to be a "successor" under the Coal Act. Therefore, the Court *must* consider whether the Buyer is a successor.

Additionally, the Court agrees with Defendants that a distinction must be drawn between "successor" and "successor in interest" and that Plaintiffs erroneously use the two terms interchangeably. What is precisely at issue in this matter is whether the Buyer, a purchaser of assets in bankruptcy, is a "successor in interest" to Defendants' Coal Act obligations [1].

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[1] A "successor" is one who voluntarily assumes a transfer of Coal Act beneficiaries and obligations. 26 U.S.C. § 9706(b)(2) ("the assigned operator *may* transfer the assignment of an eligible

"The term 'last signatory operator' shall include a *successor in interest* of such operator." 26 U.S.C. § 9711(g) (emphasis added). "A related person shall also include a *successor in interest* . . . ." 26 U.S.C. § 9701(c)(2)(A) (emphasis added). An "assigned operator" is the signatory operator to which liability with respect to Coal Act benefits attaches. 26 U.S.C. § 9701(c)(5). "Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator." 26 U.S.C. § 9704(a). Similarly, under 26 U.S.C. § 9712(d)(4), "[a] last signatory operator and any related person to such an operator, are jointly and severally liable with such operator for any amount required to be paid by such operator under this section."

Thus, only if the Buyer is a related person or "successor in interest" to Defendants will be the Buyer be required to assume Defendants' Coal Act obligations. Obligations to pay premiums to the Coal Act Funds are in the nature of taxes. *LTV Corp. v. Shalala (In re Chateaugay)*, 53 F.3d 478, 486 (2d Cir. 1995). Furthermore, the Coal Act is part of the Internal Revenue Code and the term "successor in interest" is used elsewhere in the Internal Revenue Code. The Court will give the term meaning consistent with the rest of the body of law in which it is found. *C.I.R. v. Keystone Consol. Industries, Inc.*, 113 S.Ct. 2006, 2011 (1993) (citations omitted) ("the [Internal Revenue] Code must be given 'as great an internal symmetry and consistency as its words permit.' ")

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beneficiary under subsection (a) to such successor"); 26 U.S.C. § 9711(g)(2) ("If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator *may* transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor"). The Buyer in this case cannot be a "successor" since its purchase is contingent upon *not* assuming transfer of Coal Act beneficiaries and obligations.

In the legislative regulations to the Internal Revenue Code, which have the force and effect of law, "successor-in-interest" means an acquiring corporation in a tax-free exchange in which the acquiring corporation succeeds to the tax attributes of a selling corporation. 26 C.F.R. § 1.1503-2(c)(12). Purchasers of assets in bankruptcy do not necessarily succeed to the tax attributes of the seller. For example, purchasers of assets in bankruptcy do not take assets on a carryover basis for tax purposes but take on a fair market basis. Therefore, purchasers of assets in bankruptcy cannot be "successors in interest" because, as that term is defined in the Internal Revenue Code, they do no inherit the tax attributes of their predecessors. In this case, because Buyer is purchasing Defendants' assets in bankruptcy, Buyer cannot be a "successor in interest" to Defendants as that term is used in the Coal Act. Therefore, no successor liability attaches to Buyer unless Buyer voluntarily assumes the same as a successor as that term is used in the Coal Act.[2]

B. *The Bankruptcy Court Can Authorize a Sale Free and Clear of an Interest or Claim*

Defendants argue in the alternative that, even if the Court were to find, which it does not, that Coal Act liability attaches to assets in an arms length purchase in bankruptcy by the terms of the Coal Act, the Bankruptcy Court can authorize the instant purchase between Defendants and the Buyer to occur free and clear of liens, claims, encumbrances and interests. (Defendants' Brief, p. 17.)

A creditor has an "interest in the property" of a debtor when he has a right to seek a future money payment from the debtor. *WBQ Partnership v. Va. Dept. of Medical Assistance Services,* 189 B.R. 97, 105 (Bankr. E.D. Va. 1995). Absent a "free and clear" order, Plaintiffs

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[2] *See supra* note 1.

would have a statutory right to future premium payments from Defendants even if the Buyer purchases Defendants' assets free from any liability by the Buyer, and so the Court finds Plaintiffs have an "interest in property."[3] Thus, their right to future premium payments is subject to § 363(f) which authorizes the Bankruptcy Court to allow a sale free and clear of an "interest in property."[4]

Plaintiffs' alternative argument that their right to premium payments under the Coal Act is not a "claim" is also without merit. Plaintiffs believe that Coal Act obligations which have not accrued or been assessed against Defendant are not "claims" of Defendants' bankruptcy estates because they are not affected by bankruptcy but are incurred periodically, are not yet accelerated and are not contingent. (Plaintiffs' Response, pp. 3-10.)

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[3] Plaintiffs draw the Court's attention to the distinction between the Coal Act obligations to pay premiums and the obligations to provide benefits. (Plaintiffs' Response, p. 4, n.4.) As an "interest in property" is a right to seek future money payment, Plaintiffs' "interest in property" cannot include Defendants' obligation to provide benefits, which is, as Plaintiffs state, " 'unequivocal,' even in bankruptcy." (*Id., citing In re Sunnyside Coal*, bench op. attached as Exhibit A to Plaintiffs' Response, pp. 17-18.) Thus, under § 363(f), the Bankruptcy Court cannot issue an order permitting a sale "free and clear" of Defendants' obligation to provide benefits under the Coal Act.

[4] The Court finds that Defendants have successfully distinguished *Michigan Employment Security Commission v. Wolverine Radio Co.*, 930 F.2d 1132 (6th Cir. 1991), cited by Plaintiffs in support of their argument that Defendants assets cannot be sold free and clear of Coal Act liability. In *Wolverine Radio* the court determined that the debtor's experience rating survived a sale in bankruptcy. Unlike in *Wolverine Radio* where the experience rating was not a debt and its survival of the bankruptcy sale was only contemplated after the sale, these parties clearly contemplate selling free and clear of Coal Act liability which is a debt. Additionally, although not dispositive since the Court found that the Buyer was not a "successor in interest" to Defendants, in *Wolverine Radio* tax liability only arose when the successor employed workers post-petition, whereas Coal Act liability attaches to certain "successors in interest" regardless of post-petition employment.

11 U.S.C. § 101(5)(A) defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ." The Court finds that Congress' intent in giving such a broad meaning to the word "claim" in bankruptcy was to ensure that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266; S.Rep.No. 989, 95th Cong, 2d Sess 22, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5808. In *United States v. LTV Corp. (In re Chateaugay)*, 944 F.2d 977 (2d Cir. 1991), the issue before the court was whether CERCLA response costs for pre-petition releases of pollution were claims in the bankruptcy proceeding. The court cited to the above-quoted legislative history of § 101(5) of the Bankruptcy Code, stating, "[b]y this broadest possible definition . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." *Id.* at 1003 (citations omitted).

While the court reexamined its holding in *United States v. LTV* in a more recent case involving the same debtor and its Coal Act obligations, noting that the definition of a "claim" is not infinite, the Second Circuit held that, at a minimum, a claim means a "right to payment." *LTV v. Shalala*, 53 F.3d at 496-97. In *LTV v. Shalala* the debtor filed for bankruptcy *before* the Coal Act was enacted, and therefore, Coal Act liability was not found to be a "claim" in bankruptcy because there "was no legal relationship defined at the time of the petition." *Id.* at 497.

In the present case, Defendants are liable for past and future Coal Act premiums due to Plaintiffs even though future premiums have not yet accrued and are not fixed

in their amount. Payment is contingent upon the number of surviving retirees under each of the Funds. Plaintiffs have a right to payment of those premiums as they accrue and, therefore, Plaintiffs hold an unliquidated claim, contingent, at least in part, for Coal Act premiums. The Bankruptcy Court can estimate contingent claims pursuant to 11 U.S.C. § 502(c). Thus, under the broad definition of "claim" as it is defined in 11 U.S.C. § 101(5)(A), Defendants' liability for premiums is in the nature of a "claim" as well as being Plaintiffs' "interest in property."

The Court finds that as such, Plaintiffs' right to payment of future premiums could be accelerated and channeled to the proceeds of the sale. *Contra LTV v. Shalala,* 53 F.3d at 496-98 (rejecting the idea of accelerating Coal Act obligations). Plaintiffs' right to payment of past Coal Act premiums will, of course, be channeled to proceeds of the sale. The Bankruptcy Court has the authority to do so under 11 U.S.C. § 105(a) which is the source of the Bankruptcy Court's equitable power to "issue any order, process, or judgment that is necessary and appropriate to carry out the provisions of this title."

Additionally, it is significant to note that there is nothing in the Bankruptcy Code expressly limiting the definition of "claim" to preclude future liabilities such as those due to Plaintiffs under the Coal Act. Likewise, there is nothing in the Coal Act explicitly stating that liabilities under that statute remain unaffected by bankruptcy.

Having found that Defendants' Coal Act obligations to pay premiums are Plaintiffs' "interests in property," by the conditions of § 363(f)(1), the Bankruptcy Court can only authorize a sale free and clear of an "interest in property" if "applicable, non-bankruptcy law permits sale of such property free and clear of such interest." 11 U.S.C. § 363(f)(1). As the Court has interpreted it above, the Coal Act, which is applicable non-bankruptcy law, does not permit the sale of property free and clear of "successor in interest" liability. Therefore, from the plain meaning of the § 363(f) of the Bankruptcy Code,

if the Buyer had been found to be a successor in interest within the meaning of the Coal Act, then the Bankruptcy Court would not have authority to allow a free and clear sale. However, having found that the Buyer in this case is not a "successor in interest," Defendants alternative arguments that Plaintiffs' right to Coal Act premiums are "interests in property" which the Bankruptcy Court can authorize a sale free and clear of, or, alternatively, "claims" which can be channeled to proceeds of the sale, work as well.

C. *Defendants Do Not Seek "Discharge" and, Therefore, § 524(e) is Irrelevant*

Black's Law Dictionary defines" discharge" in the bankruptcy context in the following manner:

> The release of the debtor from all of his debts which are provable in bankruptcy, except such as are excepted by the Bankruptcy Code. The discharge of the debtor is the step which regularly follows the filing of a petition in bankruptcy and the administration of his estate. By it the debtor is released from the obligation of all his debts which were or might have been proved in the proceedings, so that they are no longer a charge upon him, and so that he may thereafter engage in business and acquire property without its being liable for the satisfaction of such former debts.

Blacks Law Dictionary, Abr. 6th Ed., p. 319.

In their Motion to Sell, Defendants specifically state that "all rights of lienholders holding valid, enforceable and perfected liens shall attach to the proceeds generated from sale of the Property." (Motion to Sell at ¶ 14.) Thus, Defendants do not seek discharge of their debts through the proposed sale. They seek elimination of their future obligations under the Coal Act. Therefore, as Defendants argue, § 524(e) of the Bankruptcy Code dealing

with the effect of discharge on debts of the debtor is irrelevant to the issue of whether the bankruptcy court has the authority to allow a sale under the terms that Defendants and the Buyer seek.

D. *The Sale is Not a Sham Transaction*

A sale under § 363 of the Bankruptcy Code must be in "good faith." *In re Abbott Dairies of Pennsylvania*, 788 F.2d 143 (3d Cir. 1986); *In re Bleaufontaine*, 634 F.2d 1383, 1386 (5th Cir. 1981). Section 9722 of the Coal Act deals with "sham transactions." Plaintiffs invoke both the concepts of good faith and sham transactions when they argue that allowing the Buyer in this case to purchase Defendants' assets free and clear of Coal Act obligations will open the floodgates for large coal operators to file for bankruptcy under Chapter 11 and sell their assets to an alter-ego, thereby avoiding their obligations under the Coal Act. (Plaintiffs' Brief at pp. 16-17.) Thus, Plaintiffs, in stating that "avoidance of Coal Act liability is the *sine qua non* for the proposed transaction," (Plaintiffs' Brief at p. 27), imply that the instant sale is a "sham transaction" made in bad faith as prohibited by 26 U.S.C. § 9722. Plaintiffs base their conclusion on Defendants' assertion that Defendants' deal with the Buyer will not go forward unless the Buyer is relieved of Defendants' Coal Act obligations. (Defendants' Brief at p. 9.)

In this regard Defendants state:

> [T]he value of the assets to be acquired by Royal Scot cannot support the imposition of such a huge liability [$7,000,000 in Coal Act liabilities]; such an imposition would make the sale economically unfeasible. Thus, Royal Scot will not purchase the Debtors' assets unless the Bankruptcy Court provides that the Debtors' Coal Act obligations remain with the Debtors and do not follow what is left of the Debtors' assets.

(Defendants' Brief at p. 9.)

The Court finds that Defendants' candor in describing the consequences on the proposed sale of sustaining Plaintiffs' Objection is not an admission that the sale is not in good faith or is a sham. Rather, it is a stark and realistic assessment of the prospects of any sale of these assets.

Santa Fe Pacific Corp. v. Central States Southeast and Southwest Areas Pension Fund, 22 F.3d 725 (7th Cir. 1994), *cert. denied*, 11 S.Ct. 483 (1995), cited by Plaintiffs is inapposite to the case at bar and distinguishable by its extensive factual record on the issue of intent. *Santa Fe* holds that whether a purpose is "principal" or not is whether it is "one of the principal purposes of the transaction." *Id.* at 730. In *Santa Fe* the court held that if the sale would not occur *but for* a provision avoiding liability for the buyer, then a principal purpose of the transaction was to avoid liability. *Id.* at 729. Similarly, in this case the sale will not occur but for the Buyer's avoidance of liability. (Defendants' Brief at p. 9.) However, the Court finds that this fact does not make such avoidance a principal purpose of the proposed transaction. Avoidance of future obligations for the Buyer is simply a consequence and a condition of the sale. An important distinction between this case and *Santa Fe* is that unlike the statute in *Santa Fe* in which the proposed sale would have resulted in no obligation for the principal to fund the plan of its subsidiary, under the Coal Act and the Bankruptcy Code proceeds from the sale in this case *will* go to pay creditors, including Plaintiffs. Unlike the statute in *Santa Fe*, under the Coal Act Defendants remain liable for past and future unpaid premiums.

Another distinction between this case and *Santa Fe* is that there were extensive factual findings in *Santa Fe* regarding the intent or purposes behind the proposed sale. Under the limited factual record before this Court and the Bankruptcy Court, there is no indication whatsoever that the Buyer and Defendants created this deal so that

Defendants could avoid their Coal Act obligations.[5] Rather, Defendants were unable to sell their assets to a buyer willing to assume those obligations and so have proposed a sale that exempts the Buyer from future liability. Bad faith in this case is unsupported by any facts in the record and the argument that this is a sham transaction designed by Defendants to avoid Coal Act obligations is therefore without merit.

IV. Conclusion

The Court has given this matter considerable deliberation. The Court recognizes the importance of the continued solvency of the Funds and the desire on the part of Plaintiffs to ensure continuing beneficiary contributions from coal industry employers. However, the Court believes that the agreement between Defendants and the Buyer is permissible under the Bankruptcy Code and the Coal Act and is a noncollusive one, made in good faith, which represents the best possible solution to the situation in which these parties find themselves. If the proposed sale between Defendants and the Buyer goes through, although the Buyer will not be contributing the Defendants' future obligations to the Funds, jobs will be created when the property is mined again and funds will be generated from which to pay some of Defendants' debts, including their past due Coal Act obligations. If the sale does not go through, no one will be in a position to contribute Defendants' future obligations to the Funds, no jobs will be created, and Defendants' debts will not be paid, at least not until Defendants' assets are sold in a piece meal fashion, possibly generating less value than a sale such as this of all of Defendants' assets. The Court believes the lesser of these evils is the greater good.

Therefore, for the above-mentioned reasons, Plaintiffs' Objection is hereby OVERRULED. This matter is hereby

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[5] As noted above, Defendants will not avoid their Coal Act obligations under the proposed sale, only the Buyer will avoid its seller's obligations.

referred back to the United States Bankruptcy Court for the Southern District of West Virginia.

The Clerk is directed to send a copy of this Order to all counsel of record.

IT IS SO ORDERED this 16th day of April, 1996.

ENTER:

/s/ Elizabeth V. Hallanan
ELIZABETH V. HALLANAN
United States District Judge

APPENDIX C

[Entered Apr. 23, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Misc. No. 2:96-MC-0033

IN RE: THE LADY H COAL COMPANY, INC.
CONSOLIDATED SEWELL, INC.
SEWELL COAL COMPANY
LEIVASY MINING CORPORATION
EASTWOOD CONSTRUCTION, INC.
Debtors in Possession.

MEMORANDUM OPINION AND ORDER

On March 13, 1996 the Court referred this matter to the Honorable Ronald G. Pearson, United States Bankruptcy Judge, for proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157. Judge Pearson was designated to consider the pleadings and evidence surrounding the objections of the 1992 Benefit Plan to the Debtors' motion for approval of auction and sale procedures, for authority to sell real and personal property free and clear of liens and encumbrances and for assignment of executory contracts and leases. The UMWA did not file timely written objections to the motion but did object at a hearing before Judge Pearson. Since the issues contained in the objections of both the 1992 Plan and the UMWA are closely related, Judge Pearson appropriately considered both objections in formulating his proposed disposition to this Court.

The proposed disposition was filed March 29, 1996. This Court then entered a briefing schedule for objections.

The Court has considered the proposed disposition and the briefing. The case is ripe.

I. DISCUSSION

Following the submission of Judge Pearson's proposed disposition, the Honorable Elizabeth V. Hallanan, United States District Judge for the District, entered a Memorandum Opinion and Order on April 16, 1996, which now is binding district precedent and which resolves the objections filed by the 1992 Plan in this case. *See UMWA 1992 Benefit Plan And Its Trustees v. Leckie Smokeless Coal Co.*, No. 5:96-0092 (S.D. W. Va. Apr. 16, 1996).

In *Leckie*, the Court addressed the "issue of the effect of a free and clear order under 11 U.S.C. § 363 on successor liability under the Coal Industry Retiree Health Benefit Act of 1992 ('the Coal Act'), 26 U.S.C. § 9701, *et seq.*" Slip op. at 2. In sum, Judge Hallanan held (1) successor liability of a buyer under the Coal Act could not be eliminated simply by virtue of a § 363 sale; (2) only a buyer who is either a related person or "successor in interest" could be required to assume a debtor's Coal Act obligations in a § 363 sale; (3) under an Internal Revenue Code definition of successor in interest, "purchasers of assets in bankruptcy cannot be 'successors in interest' because, as that term is defined in the Code, they do no[t] inherit the tax attributes of their predecessors[,]" slip op. at 16; (4) the obligations due the Funds constituted an "interest in property" under § 363(f) and a "claim" under 11 U.S.C. § 101(5); (5) the debtors' assets could be sold under § 363(f) free and clear of the obligations due the Funds; (6) the debtors did not seek a discharge of debts through the proposed sale, and thus 11 U.S.C. § 524(e) was inapplicable; and (7) the proposed transaction was not a "sham transaction" within the meaning of § 9722 of the Coal Act.

The ruling in *Leckie* disposes of the objections by the 1992 Plan in this case because, *inter alia*, the apparent

buyer at the proposed sale, as a matter of law, cannot be considered a related person or "successor in interest" to Debtors under the Coal Act. Further, as found by the Bankruptcy Judge, there is absolutely no indication that the free and clear portion of the proposed sale is either a "sham transaction" under § 9722 of the Coal Act or not undertaken in good faith pursuant to § 363(f) of the Bankruptcy Code.[1] Rather, the "sale has not been proposed for any reason other than to liquidate the property of these Debtors in a way to obtain the maximum return for all creditors, including the objecting creditors." Proposed Disp. at 6. Accordingly, the objections of the 1992 Plan are OVERRULED.[2]

The *Leckie* decision does not control the objections filed by the UMWA. After careful consideration of those objections, however, the Court concludes they are not meritorious. As amply demonstrated in Judge Pearson's proposed disposition, the breadth of § 363(f) and § 101 (5)(B) is sufficient to block the imposition on the buyer of any liability for Debtors' obligations under the collective bargaining agreement. Accordingly, the Court OVERRULES the objections of the UMWA and ADOPTS and INCORPORATES Judge Pearson's proposed disposition relating to the buyer's and Debtors' obligations to the UMWA under § 363(f). As noted, however, Debtors may be subjected to damages later if they should be de-

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[1] The Court leaves to the Bankruptcy Judge the question of whether the consideration for, and other components of, the proposed sale independently satisfy the good faith and fair and reasonable value requirements of § 363(f).

[2] The very thorough *Leckie* opinion and Judge Pearson's well-reasoned proposed disposition reach the same result via only slightly dissimilar analyses. The Court believes the better approach under the principle of *stare decisis*, however, is to follow the recent *Leckie* decision. Should Judge Hallanan revisit her Order, or should that Order meet with less than full agreement from the Court of Appeals, the Court would adopt in the alternative Judge Pearson's fine analysis.

termined to have breached the collective bargaining agreement.

II. CONCLUSION

As set forth in the foregoing discussion, the Court OVERRULES the objections of the 1992 Plan and the UMWA and ADOPTS the proposed findings of fact and conclusions of law as they relate to the UMWA's objections. This case is REFERRED to the United States Bankruptcy Court with full authority to proceed to sale.

The Clerk is directed to close this miscellaneous proceeding and to send a copy of this Memorandum Opinion and Order to counsel of record and Judge Pearson.

ENTER: April 23, 1996

/s/ Charles H. Haden II
CHARLES H. HADEN II
Chief Judge

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA

Case. No. 94-20449
IN RE: THE LADY H COAL COMPANY, INC.

Case No. 94-20766
CONSOLIDATED SEWELL, INC.

Case. No. 94-20765
SEWELL COAL CO.

Case No. 94-20767
LEIVASY MINING CORPORATION

Case No. 94-20710
EASTWOOD CONSTRUCTION, INC.
Debtors in Possession.

Chapter 11-
Administrative Consolidation

RECOMMENDATION AND MEMORANDUM TO DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA ON OBJECTIONS OF UMWA 1992 BENEFIT PLAN AND UMWA INTERNATIONAL TO THE MOTION OF DEBTORS FOR AUTHORITY TO SELL REAL AND PERSONAL PROPERTY FREE AND CLEAR OF LIENS AND ENCUMBRANCES AND FOR ASSIGNMENT OF EXECUTORY CONTRACTS AND LEASES

INTRODUCTION

This Court has under consideration certain objections to the Motion of Debtors for Approval of Auction and Sale Procedures, for Authority to Sell Real and Personal Property Free and Clear of Liens and Encumbrances and for Assignment of Executory Contracts and Leases (the "Debtors' Motion") as filed on March 7, 1996. A hearing was conducted on the Debtors' Motion and respective objections on March 13, 1996. The parties and counsel appearing at the hearing are noted in Exhibit A. The Court granted the Debtors' Motion subject to the District Court's review of recommended findings of fact and conclusions of law as it relates to the objections of (1) Michael H. Holland, Marty D. Hudson, Thomas F. Connors, and Robert T. Wallace, Trustees of the UMWA 1992 Benefit Plan (the "1992 Plan") and (2) United Mine Workers of America, International ("UMWA"). No other creditor or party-in-interest has any substantive objection to the Debtors' Motion. The Debtors' Motion as presented proposes a piecemeal liquidation of equipment by auction, but requires this Court to conduct a hearing subsequent to the auction to confirm the sale of real estate assets by determining if the Debtors have satisfied the requirements of 11 U.S.C. § 363. The Court must find that the auction was conducted in good faith and any bids represent fair and reasonable value to the bankruptcy estates.

The 1992 Plan filed a written objection to the Debtors' Motion and moved to withdraw reference to the District Court for the Southern District of West Virginia. The District Court by Order entered March 13, 1996 directed this Court to submit proposed findings of fact and conclusions of law as it relates to the objection for disposition of issues regarding the Coal Act as they interact with the Bankruptcy Code or to indicate specifically why the Coal Act is not implicated by the Debtors' proposed grant of relief. The 1992 Plan asserts that a bankruptcy auction cannot be free and clear of obligations under the

Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701 *et seq.* The UMWA filed no timely written objection but announced its objection at the hearing to a sale free and clear of the National Bituminous Coal Wage Agreement of 1993 ("NBCWA"). Since the issues of the 1992 Plan and UMWA are closely related, the Court makes recommended findings of fact and conclusions of law to the District Court as to both objections, which raise successor liability issues. A decision on these objections of the 1992 Plan and UMWA is needed to clarify the obligations of a purchaser.

The 1992 Plan and the UMWA have the right as creditors in these cases to sponsor, purchase, joint venture, assist or finance purchasers willing to assume all or a portion of the premiums due under the Coal Act or the NBCWA. Given these rights, it is difficult to understand how counsel for the 1992 Plan or UMWA employees can assert that they are protecting the respective interests of their clients by raising these objections. Without the auction as proposed by the Debtors, administrative claims of 1992 Plan and UMWA employees will likely go unpaid and it is uncertain whether the 220 employees will work these mines again. The evidence reflects that (1) the operations of the Debtors have been shut down since mid-February, (2) both union and non-union employees were not paid for the last several weeks of work; (3) a super-priority lien has been found necessary to induce a secured creditor to advance funds to maintain power to preserve assets for the auction and to prevent the irreparable harm of flooding to the mines; and (4) secured equipment creditors are bringing equipment to the surface at their own expense in order sell collateral through the auction or independently.

The 1992 Plan and UMWA have stated on the record that their objections shall not be asserted in the event that the auction results in a piecemeal sale of the assets or if a buyer of all assets assumes the liabilities under the Coal Act and the NBCWA. Therefore, the objections of

the 1992 Plan and UMWA shall only continue to be asserted if a buyer of all assets is not willing to assume the respective obligations of the 1992 Plan and UMWA. By this request, these creditors are asking this Court to discourage bidders not willing to assume these creditors' obligations. This Court cannot rule that any buyer, who purchases substantially all of the Debtors' assets free and clear of interests, be responsible for unpaid claims due under the Coal Act and employ all former employees under the NBCWA. There is simply no provision in state or federal law that imposes the conditions the Funds and the UMWA seek. For these reasons and as set forth below, this Court recommends that the objections of the 1992 Plan and UMWA be overruled.

PROCEDURAL HISTORY

This Court entered an Order on February 28, 1996 in the above-referenced bankruptcy cases entitled Memorandum Opinion and Order Denying the Debtors' Motion to Reject UMWA Agreement, Granting the Debtors' Motion to Sell Substantially all of its Assets, Subject to the Right of the UMWA Employees to File Claims for Post-Petition Breach of Contract, Granting the Debtors' Request that Such Sale be Free and Clear of Any Interest, With Claims and Interests Attaching to The Proceeds of Sale, and Denying the Debtors' Request for Injunctive Relief, which dealt with similar issues as presented in the objections being considered in this order and memorandum, specifically the ability of Debtors to sell assets free and clear of any interests. Such Order was entered upon the motion of the Debtors to sell substantially all assets to A.T. Massey & Company ("A.T. Massey"). Upon A.T. Massey subsequently withdrawing its offer to purchase the Debtors' assets, certain parties, including the Debtors and UMWA Funds, motioned to vacate and/or moot the findings in such Order, although this Court has not acted upon such motions.

As announced at the March 13, 1996 hearing and as incorporated in separate orders, the Court accepted the modifications and clarifications to the Debtors' Motion and the stipulation between the Debtors and United Coal Company ("United"), which provided in part the resolution of United's objection to the Debtors' Motion and financing for a short period of time to continue electric power to the mines. The Court authorized a sale to be advertised pending submission of this Memorandum to the District Court. Exhibit B includes the Court's findings from the March 13, 1996 hearing on the Debtors' Motion. Finally, by Interim Order entered March 27, 1996, this Court set forth a schedule for the auction process of the Debtors. Accordingly, the auction is to take place on April 17, 18 and 19, 1996, with any advance bids which contemplate the purchase of multiple items of Real Estate, as defined in such Order, due on April 5, 1996. The Court shall conduct a hearing confirming the sale of Real Estate items on April 23, 1996 or as soon as the District Court rules upon the objections subject to this Memorandum.

RECOMMENDED FINDINGS OF FACT

The Debtors in this procedurally consolidated case include Consolidated Sewell, Inc. ("Consolidated"), parent corporation of Lady H Coal Company ("Lady H") and Sewell Coal Co. ("Sewell"), and Lady H's two subsidiaries, Leivasy Mining Corporation ("Leivasy") and Eastwood Construction, Inc. ("Eastwood"). The estate of William Post, Clyde See and John Leaberry each own one-third (⅓rd) of the parent corporation, Consolidated. Petitions for relief under Chapter 11 of the Bankruptcy Code were filed on:

Lady H:	July 20, 1994
Eastwood:	November 7, 1994
Leivasy:	December 2, 1994
Consolidated and Sewell:	December 22, 1994

The Debtors were involved in coal mining operations primarily in Nicholas, County, West Virginia, and once employed approximately 220 employees, including approximately 180 employees covered by the NBCWA.

According to the monthly operating reports filed with the Court, the Debtors' post-petition losses are substantial, with $8.6 million in losses for the fiscal year ended June 30, 1995 on sales of $21.8 million and $2.1 million in losses for the four months ended October 31, 1995 on sales of $7.7 million. The financial resources of the Debtors were depleted and operations were discontinued in mid-February. Upon the shutdown of operations, employees were unpaid for the final four weeks of work and little or no cash was left to preserve assets. The mines were and continue to be in danger of having power terminated and flooding. The Debtors have lost the ability to reorganize as an operating entity. The only option available to these Chapter 11 bankruptcy estates is a liquidation of assets, either collectively or piece-meal.

The prompt auction of substantially all the Debtors' assets, either collectively or piece-meal, should bring substantially more value for creditors in this case, including secured, landlord, and employee creditors, than a liquidation under a Chapter 7, since the Debtors are maintaining power to the mines in order to preserve the value of the working mines.[1] If power to the mines is cut off and mines flood or other damage occurs, the Court believes the value of the Debtors' property would greatly diminish. The Court finds that this sale has not been proposed for any reason other than to liquidate the property of these Debtors in a way to obtain the maximum return for all creditors, including the objecting creditors.

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[1] Funds to maintain power to the mines have been provided from the secured equipment creditors.

RECOMMENDED CONCLUSIONS OF LAW

As this Court found that time was of the essence, the Debtors' plan of an auction sale free and clear of interests was approved during a hearing conducted March 13, 1996, subject to the resolution of the objections of the 1992 Plan and UMWA by the District Court. Although the factual situation presented in this instance is different from the previously proposed private sale to A.T. Massey [2], the 1992 Plan and UMWA have again objected to a sale free and clear of interests as authorized by § 363(f) of the Bankruptcy Code. The 1992 Plan and UMWA essentially seek a protective order requiring a purchaser to assume their claims and such would chill bids at a public auction of the Debtors' property. No law permits this Court to impose such a penalty on all creditors and parties-in-interests in these cases. For the reasons set forth below, the objections of the 1992 Plan and the UMWA should be overruled.

A. Claims as Defined by the Bankruptcy Code

In order to determine what interests may be sold free and clear of liens and other interests in a court-approved public auction, a court must first determine what claims are included in these bankruptcy proceedings. The 1992 Plan believes that Coal Act obligations which have not accrued or been assessed against the Debtors are not affected by the bankruptcy, or in other words are not claims of these bankruptcy estates, while the UMWA asserts that its successorship rights pursuant to the collective bargaining agreement, entered into by these Debtors pre-petition, is not a right which may be reduced to judgment if the Debtors violate such provision. The Bankruptcy Code in § 101 provides a comprehensive definition of claim, which states:

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[2] See Order entered February 28, 1996.

(5) "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

One of the leading cases discussing the broad scope of the definition of claim is *United States v. LTV Corporation (In re Chateaugay Corporation)*, 944 F.2d 997 (2d Cir. 1991). An issue presented before the Second Circuit was whether unincurred Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") response costs for pre-petition releases was a claim within the bankruptcy proceeding. The Second Circuit in quoting the legislative history of this Bankruptcy Code section stated "[b]y this broadest possible definition . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." *Id.* at 1003, *citing*, H.R. Rep. No. 595, 95th Cong., 2d Sess. 309 (1978), reprinted in 1978 Code Cong. Admin. News 5787, 5963, 6266. Also, *see Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 558, 563-564 (1990); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985). The court was not persuaded by the argument of the Environmental Protection Agency ("EPA") that the Bankruptcy Code should be narrowly read in light of the environmental interests of Congress in enacting CERCLA, stating:

> If the [Bankruptcy] Code, fairly construed, creates limits on the extent of environmental cleanup efforts, the remedy is for Congress to make exceptions to the Code to achieve other objectives that Congress chooses to reach, rather than for courts to restrict the meaning of across-the board legislation like a bankruptcy law in order to promote objectives evident in more focused statutes. . . . Yet the evident intent of Congress to apply broadly the definition of "claim" counsels against the narrow reading urged by EPA, especially in the context of obligations arising out of public regulation. Though there does not yet exist between EPA and LTV the degree of relationship between claimant and debtor typical of an existing though unmatured contract claim, the relationship is far closer than that existing between tort claimants totally unaware of injury and a tort-feasor. EPA is acutely aware of LTV and vice versa. The relationship between environmental regulating agencies and those subject to regulation provides sufficient 'contemplation' of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of "claims".

Id. at 1002 and 1005.

The conflict between two bodies of federal law is not limited to the case above, where the broad interpretation of a claim under the Bankruptcy Code prevailed over national environmental legislation. As stated in *Sheet Metal Workers' Int'l Ass'n v. Mile Hi Metal Systems, Inc. (In re Mile Hi Metal Systems, Inc.)*, 889 F.2d 887 (10th Cir. 1990):

> The Bankruptcy Code cuts across a broad spectrum of other areas of law in order to allow debtors the opportunity to reorganize. . . . We recognize the strong national policies which protect workers from unfair labor practices and ensure the enforceability of collective bargaining agreements. . . . But Chap-

> ter 11 of the Bankruptcy Code reflects an equally strong public policy "to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB v. Bildisco*, 465 U.S. at 528.[3]

Id. at 891.

Bankruptcy courts are commonly in a position where they must balance and decide other areas of federal law. *See e.g. In re Lombardo Fruit & Produce,* 106 B.R. 593 (Bankr. E.D. Mo. 1989) (applying the Perishable Agricultural Commodities Act); *In re Brown,* 106 B.R. 852 (Bankr. E.D. Pa. 1989) (interpreting the Truth in Lending Act).

In these cases, the 1992 Plan asserts that the District Court is required to resolve the conflict between the Bankruptcy Code and the Coal Act to determine whether the claims of the 1992 Plan encompass the entirety of the liability as it relates to these retirees which may be sold free and clear at a public auction or whether the Coal Act allows the 1992 Plan to later assert premiums which these bankruptcy estates are responsible for against a successor, as such term is used and undefined in the Coal Act. There is no dispute that the Coal Act was enacted by Congress in 1992 to address the health care crisis of retired UMWA coal miners and their dependents, which is not unlike the broad and sweeping purposes of CERCLA in addressing national hazardous environmental issues.

Pursuant to the 1992 Benefit Plan, as contained in the Coal Act, these Debtors, as signatory operators under the

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[3] Based upon this Supreme Court opinion, which allowed the unilateral rejection of a collective bargaining agreement, Congress subsequently enacted 11 U.S.C. § 1113; however, the quoted passage above states an important purpose of bankruptcy law and an important issue to the approximate 220 workers who can be provided jobs at the Leivasy mines.

1988 National Bituminous Coal Wage Agreement, have a responsibility to provide health care coverage for retirees, and if the Debtors fail to provide such benefits, the 1992 Plan shall provide the benefits. *See* 26 U.S.C. § 9711 and § 9712(b)(2). The 1992 Benefit Plan is funded in part by monthly per beneficiary premiums from employers, such as the Debtors. *See* 26 U.S.C. § 9712 (d)(1)(B). As the 1992 Plan points out in its Memorandum in Support of UMWA 1992 Benefit Plan's Motion to Withdraw the Reference Pursuant to 28 U.S.C. § 157(d), as filed with the District Court, the Debtors continue to be liable for such premiums whether or not the Debtors remain in business. As previously stated, these Debtors discontinued operations in mid-February of 1966 and consequently remain liable for any premiums whether such premiums have accrued or not. The 1992 Plan relied upon the decision in *Holland v. Double G Coal Co.*, 898 F.Supp. 351 (S.D.W.Va. 1995) for the proposition that even if a signatory operator ceased business it remained liable for such obligations.

In applying this holding to the present facts, the Debtors remain liable for the entire amount of premiums due to the 1992 Plan even though such premiums have not accrued or are not fixed in amount. Therefore, the 1992 Plan holds a claim, which is unliquidated and contingent in part, for the amount of premiums to be assessed for the approximate 150 retirees of the Debtors. This Court finds no conflict with the Bankruptcy Code as the broad definition of claim pursuant to 11 U.S.C. § 101(5) encompasses the entire liability of these Debtors under the 1992 Plan, whether or not such premiums have been assessed against the Debtors. Further, this Court pursuant to 11 U.S.C. § 502(c) is empowered to estimate such contingent claims as to not unduly delay the administration of the estate.

If Congress wished to exclude Coal Act liabilities from the reach of bankruptcy law, it could have done so by

providing exceptions to a sale free and clear of any interest or limiting the definition of claim in the Bankruptcy Code or by providing express language in the Coal Act that liabilities remain unaffected by operation of the Bankruptcy Code. However, Congress has not provided any express statutory language which would limit the definition of a claim under the Bankruptcy Code to preclude the past and future liabilities of these Debtors as created by the Coal Act. The Coal Act became effective prior to these Debtors seeking bankruptcy protection and upon the effective date of the 1992 Plan, these Debtors became liable for health benefits for the retirees and their dependents covered by such plan.

This finding is not contrary to the decisions in *Adventure Resources, Inc. v. Holland (In re Adventure Resources, Inc.)*, C.A. No. 2:94-0858 (S.D.W.VA. March 8, 1996) or *LTV Corporation v. Shalala (In re Chateaugay Corporation)*, 53 F.3d 478 (2d Cir. 1995). In the *Adventure* opinion, the issue before the District Court was whether all or a portion of the accrued premiums under the Coal Act were entitled to an administrative expense priority and not whether their claim also consisted of contingent and unmatured obligations. Likewise, in the *LTV* case, the Second Circuit found that since the Coal Act was enacted approximately six years prior to the debtor filing for bankruptcy protection, such liability could not be considered a claim, either contingent or unmatured, within the bankruptcy proceeding, as there was "no legal relationship defined at the time of the petition." *Id.* at 497. In these cases, since the Coal Act became effective on February 1, 1993, long before any of these Debtors filed for bankruptcy relief, it is clear that the obligation arose prior to the bankruptcy proceeding and is therefore a claim within these proceedings, whether or not such claim is matured or unmatured.

The UMWA asserts that its rights as created by Article I of the NBCWA are not claims within this bankruptcy

proceeding and the UMWA essentially seeks an order that limits the sale of real estate assets to only those who will assume the Debtors' labor agreement.[4] However, this Court believes that such labor contract rights are exactly the sort of claim encompassed by 11 U.S.C. 101(5)(B) as quoted above. The fundamental argument advanced by the UMWA is that the contractual rights pursuant to the NBCWA require assets to be sold to a purchaser who will assume the NBCWA. If a sale in this instance results in a breach of the collective bargaining agreement, specifically Article I of the NBCWA, the UMWA employees may assert damages for breach of such provision.[5] However, if a breach does result from the Debtors' proposed auction, the same does not prevent a sale free and clear of the NBCWA as the rights of the UMWA are claims within these bankruptcy proceedings. As found in the *LTV* case, the UMWA cannot seek the equitable remedy of enjoining the sale since if a breach of the NBCWA occurs it may be satisfied by monetary damages asserted against the Debtors.

For the reasons set forth above, the Court finds that the 1992 Plan and UMWA hold claims within these

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[4] Article I of the NBCWA states in part:

> In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this agreement. Immediately upon the conclusion of such sale, conveyance, assignment or transfer of its operations, the Employer shall notify the Union of the transaction. Such notification shall by certified mail to the Secretary-Treasurer of the International Union and shall be accompanied by documentation that the successor obligation has been satisfied.

[5] See February 28, 1996 Order allowing UMWA employees monetary damages if Debtors breached Article I of the NBCWA. This Court does not express an opinion of whether a breach of the NBCWA occurs as a result of this auction, as such a finding is not ripe for adjudication.

bankruptcy proceedings, whether or not such liabilities are unassessed, unmatured, contingent or an equitable remedy that may be satisfied by damages. As it relates to the 1992 Plan, such claims against these Debtors would include all accrued and unaccrued premiums for the 150 retirees the Debtors are responsible for under the 1992 Plan by operation of the broad definition of claim pursuant to 11 U.S.C. § 101(5)(A) and the holding in *Holland v. Double G Coal Co.*, 898 F.Supp. 352 (S.D.W.Va. 1995). As for the UMWA, the NBCWA is a pre-petition contract and therefore, any rights under such collective bargaining agreement, whether or not modified or rejected, are claims within these bankruptcy proceedings, with any potential breach of any right giving rise to a damage claim within the bankruptcy cases, pursuant to 11 U.S.C. § 101(5)(B).

B. Sale Free and Clear of Any Interest

The Bankruuptcy Code in § 363(f) states:

> (f) The [debtor in possession] may sell property under subsection (b) . . . of this section *free and clear of any interest* in such property of an entity other than the estate, only if—
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f) (emphasis added).

In order to understand the genesis of case law referred to below that allows sales free and clear of any interests, including such interests as the UMWA and 1992 Plan, it is important to understand certain fundamental concepts in bankruptcy law. When these Debtors sought protection under the Bankruptcy Code, estates were created, consisting of all of the property of the Debtors and as defined under 11 U.S.C. § 541. As described above, the 1992 Plan and UMWA have claims pursuant to 11 U.S.C. § 101(5) within these bankruptcy estates even though such claims may be contingent or unmatured, and resolution of these claims are within this Court's jurisdiction pursuant to 11 U.S.C. § 502. In a liquidating Chapter 11, the only method to satisfy claims is through the sale of property as proposed by these Debtors pursuant to § 363 of the Bankruptcy Code. The claims of all creditors in these cases will attach to the proceeds of the sale.

The well established rule that sales within a bankruptcy proceeding occur free and clear of any interest is founded upon the principle that good faith purchasers receive clean title to the property and that any claims against the property attach to the proceeds. Accordingly, the definition of "interest" has been interpreted broadly, although not limitless. This channeling effect of claims to the proceeds protects good faith purchasers and thus encourages full value offers to bankruptcy estates. The channeling of claims to proceeds also precludes creditors from receiving preferential treatment and ensures that all creditors are treated according to the priorities of distribution as established by Congress in the Bankruptcy Code.[6]

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[6] It is conceptually difficult to understand how an unsecured creditor can assert that they are to be excluded from the definition of "interests" as utilized in the Bankruptcy Code in § 363(f). Such exclusion would result in an unsecured creditor later asserting the same claim against a good faith purchaser, which would disrupt and give priority and preference to an unsecured creditor. It is clear in the Bankruptcy Code that a secured creditor receives pay-

As stated by the Second Circuit:

> In *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931), the Supreme Court explained that even absent express statutory authority, the Bankruptcy Court had the inherent equitable power to sell a debtor's property and to transfer third-party interests to the proceeds of the sale. 284 U.S. at 227-228. See also *Ray v. Norseworth*, 90 U.S. (23 Wall.) 128, 134-135 (1874) (court may sell bankrupt's property encumbered by third party claims as long as third parties retain their respective priorities in the proceeds of the sale); *Fieman v. Seward National Bank*, 37 F.2d 11, 13 (2d Cir. 1930) ("When the bankrupt's property was sold free of liens, the liens upon the property became rights against the substituted proceeds of sale, and claimants to this fund were obliged to assert their rights by applying to the court in whose custody it was."); *In re Penn Central Transportation Co.*, 383 F.Supp. 1128, 1130 (E.D. Pa. 1974) (power of a reorganization court to transfer interests in debtor's property to the proceeds of a sale is well established).

In re Johns-Manville Corporation, 837 F.2d 89, 93 (2d Cir. 1988), *cert. denied*, 488 U.S. 868 (1988).

Extensive case law exists that claims are directed to the proceeds of a free and clear sale of property and may not subsequently be asserted against a successor. *In re Johns-Manville Corporation*, 837 F.2d 89 (2d Cir. 1988), *cert. denied*, 488 U.S. 868 (1988) (channeling of claims to proceeds consistent with intent of sale free and clear under § 363(f)); *In re New England Fish Co.*, 19 B.R.

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ment from proceeds before payment to an unsecured creditor and it is also clear that a bankruptcy sale is free and clear of a secured creditor's claim. This Court cannot find any legislative history or case law that would support such an elevation of an unsecured claimant which is effectively the grant of relief the UMWA and the 1992 Plan seek by their objections.

323 (Bankr.W.D. Wash. 1982) (transfer of property in free and clear sale included free and clear of Title VII employment discrimination and civil rights claims of debtor's employees); *In re Robert Hoffman,* 53 B.R. 874 (Bankr. D. R.I. 1985), *aff'd,* 65 B.R. 985 (D. R.I. 1986) (transfer of liquor license free and clear of any interest permissible even though the estate had unpaid taxes); *In re All American of Ashburn, Inc.,* 56 B.R. 186 (Bankr. N.D.Ga. 1986) (product liability claims precluded on successor doctrine in a sale of assets free and clear); *International Union, Etc. v. Morse Tool, Inc.,* 85 B.R. 666 (D. Mass. 1988) (district court upheld bankruptcy court order selling assets free and clear of all encumbrances including collective bargaining agreements); *In re Paris Industries Corp.,* 132 B.R. 504 (D. Me. 1991) (free and clear sale enabled bankruptcy court to enjoin product liability claims as asserted against purchaser); *In re WBO Partnership,* 189 B.R. 97 (Bankr. E.D. Va. 1995) (State of Virginia's right to recapture depreciation is an interest as used in § 363(f)).

The UMWA asserts that the decision in *Morse Tool* is not persuasive as the collective bargaining agreement which was determined to be an interest as utilized in § 363(f) did not contain a successorship clause as contained in Article I of the NBCWA. There is nothing in this opinion as issued by the district court which would lead to this conclusion, as the collective bargaining agreements are not quoted in part or in whole. The issue before the court was whether to uphold the bankruptcy court's decision to allow a sale free and clear of the collective bargaining agreements over the objection of the UAW, or reverse the bankruptcy court decision and provide that the sale was subject to the collective bargaining agreements. It is clear from the *Morse Tool* decision that the district court allowed a sale free and clear of the collective bargaining agreement.

Likewise, the *In re All American of Ashburn, Inc.* case is incorrectly cited by the UMWA.[7] This case as cited above dealt with the issue of whether a Chapter 7 trustee's sale of assets free and clear of claims precludes product liability actions against the successor, when such actions arose prior to the bankruptcy sale. The bankruptcy court was persuaded by the argument of the purchaser which stated in part:

> On this point, [the purchaser] argues that the Court should apply the reasoning set forth in *Forde v. Kee-Lox Manufacturing Co., Inc.*, 437 F.Supp. 631 (W.D.N.Y. 1977), *aff'd on other grounds*, 584 F.2d 4 (2d Cir. 1978), and *Rubenstein v. Alaska Pacific Consortium (In re New England Fish Co.)*, 19 B.R. 323 (Bankr. W.D. Wash. 1982). In these cases, the courts held that a sale of the debtor's assets, approved by the Bankruptcy Court as free and clear of all claims, precludes the application of the successor doctrine against a purchaser of those assets in a suit based on the debtor's alleged employment discrimination and violation of employees' civil rights.
>
> The *Forde* case sets out two policies against allowing successor liability to follow bankruptcy sales. The first is that if a plaintiff asserts a claim grounded on successor liability after a bankruptcy sale, he, in effect, receives a priority over those claims which were paid in accordance with the Bankruptcy Code. *Forde*, 437 F.Supp. at 633. The result is that the successor liability theory would rearrange the priority scheme established by the Bankruptcy Code. *Id.*

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[7] The UMWA refers to this case as a shareholder derivative action based upon 805 F.2d 1515 (11 Cir. 1986), which was the affirming case incorrectly cited by Shepards and cited in this Court's Order of February 28, 1996. This Court in its February 28, 1996 Order and this Memorandum relies upon the bankruptcy court decision as found in 56 B.R. 186.

> The other reason is the negative impact that potential successor liability claims would have on the trustee's ability to sell assets of the estate at a fair price. *Id.* At 633-634.
>
> The Bankruptcy Court in *Rubenstein* also applied these two principles. In doing so, the Court relied on the mandate of the United States Supreme Court in *Nathanson v. National Labor Relations Board,* 344 U.S. 25, 29 (1952), that "[t]he theme of the Bankruptcy Act is 'equality of distribution' (*Sampsell v. Imperial Paper Corp.,* 313 U.S. 215); and if one claimant is to be preferred over the other, the purpose should be clear from the statute." *Rubenstein,* 19 Bankr. at 326. . . . Finding no suggestion that Congress intended to allow the successor doctrine to rearrange the priority of distribution established by the Bankruptcy Code, the Court held that the Supreme Court holding in *Nathanson* must prevail over the policies in allowing successor liability in civil rights cases. *Id.*

In re All American Ashburn, Inc. at 189-190.

The Court finds a number of problems with the fundamental argument that a purchaser must assume the NBCWA. Foremost, the UMWA ignores the fact that this venture has failed financially. This venture that brought together employees under a UMWA agreement with owners and creditors has failed to generate sufficient revenues to pay the costs for which the venture was liable. The business is closed and at closure both union and non-union employees were not paid for several weeks of wages. The millions of dollars of unpaid post-petition and pre-petition claims in the cases make it folly to think that anyone would lend money to restart the operations.

The implication from the argument of the UMWA is that these Debtors or their officers intentionally scuttled these operations to create the necessity for a sale. Dur-

ing the pendency of these bankruptcy proceedings, the Debtors have been required to file monthly financial information, which included a detailed accounting of expenses. At the filing of these bankruptcy petitions, the Debtors were required to disclose in their schedules transfers of assets outside the normal course of business as well as transactions with professionals and insiders. Officers and shareholders of the Debtors have been available for discovery and testimony under oath in addition to the financial records of the Debtors. Despite the discovery tools or financial reporting available to creditors or other parties-in-interest, no evidence has been presented or produced to this Court which would indicate improper transfers that could have been recovered to allow these Debtors to continue to operate. In fact, a review of the unpaid administrative expenses and claims in these cases reveal that it is the claims of Workers Compensation, UMWA Funds, suppliers, employees, landlords, secured creditors and administrative expense creditors that simply outstripped the revenues generated by the Debtors.

The Bankruptcy Code provides a means of insuring the best possible result from the sale or liquidation of a business' assets once reorganization is no longer possible. All property of value can be sold free and clear of liens and other interests at a well advertised auction. The rights of buyers at a bankruptcy sale free and clear of liens and other interests are given this protection to insure that the best offers are made and as many claims as possible are paid from the sale proceeds. Any entity that purchases the Debtors' assets must abide by all applicable federal and state laws once a sale is accomplished, including the protections afforded by the National Labor Relations Act, which provides a mechanism for election of a collecting bargaining representative. Further, a buyer does not escape any independent liability to the 1992 Plan or any other creditor of the Debtors as conduct, actions, or history particular to a buyer is not altered by making a

purchase free and clear under § 363. However, the obligations of these Debtors, including accrued and unaccrued liabilities of the 1992 Plan, UMWA, and taxing authorities, must be satisfied by looking to the proceeds received by the Debtors from the auction of the Debtors' assets. Therefore, it is now time for the UMWA and the 1992 Plan to do what every creditor has a right to do at such a sale; encourage bidders who they would like to have operate these properties [8], consider investing in or becoming an owner of the enterprise, or enter into an agreement with a buyer to assure that some of the profitability problems of the past are solved upon purchase of the Debtors' assets.

As cited above, in quoting the *Rubenstein* case, the Supreme Court has made it clear that a statute must be clear as to successor liability if such liability is intended to disrupt the priorities of the Bankruptcy Code. The 1992 Plan has yet to provide a clear definition of successor as utilized in the Coal Act which would disrupt the priority scheme in these bankruptcy cases. The case law cited by the 1992 Plan is not remotely on point to the facts presented in this case. First, in *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994), the issue raised was whether product liability claims, arising subsequent to the sale of property and the closing of the bankruptcy case, could be asserted against the purchaser. The Seventh Circuit found that since the debtors were no longer in existence, the bankruptcy court did not maintain any "related to" jurisdiction and the bankruptcy court's previous injunction against product liability claims was ineffective to claimants who did not have notice of the sale and an opportunity to protect their claims. In this case, full notice of the sale has been provided to the 1992 Plan and the 1992 Plan's right to share in the proceeds has not been curtailed.

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[8] Perhaps, a buyer will agree to assume a portion or all of the claims of the objecting creditors.

Further, the 1992 Plan appears to believe that the Debtors' requested relief results in a discharge of the 1992 Plan's claims. However, the issue presented before this Court is not whether the claims are dischargeable in these bankruptcy proceedings as in *LTV Steel Co. v. Shalala (In re Chateaugay)*, 53 F.3d 478 (2d Cir. 1995), but whether property may be sold free and clear of the 1992 Plan's interests. The Debtors are not seeking a discharge of the claims of the objecting parties but to get the best possible value from the estate property to pay as many claims as possible. For the same reasons, this Court believes that the 1992 Plan's reliance upon 11 U.S.C. § 524(e), which states in part "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt", is misplaced. Again, the Court has not been requested nor is it considering a discharge of any of these Debtors or of any purchaser. Rather, the Debtors' motion contemplates a public auction of property free and clear of interests. These contentions by counsel for the 1992 Plan are bordering on meritless arguments. One court imposed Bankruptcy Rule 9011 sanctions for an objection by a taxing authority in a free and clear sale which was based in part on the assertion that tax liens are nondischargeable. *In re Cardi Const. Co., Inc.*, 154 B.R. 403 (Bankr. D. R.I. 1993).

Finally, both objecting parties believe that since a free and clear sale does not include their interests they are allowed to later assert successor claims against the purchaser. However, since this Court believes that the 1992 Plan and UMWA are interests as utilized in § 363(f), successor liability is cut-off and the objecting creditors must look to the sale proceeds not the purchaser for satisfaction of claims. All claims against these Debtors shall attach to the proceeds to the sale and may not be asserted against any successor.

However, in the alternative, this Court addresses the 1992 Plan's assertion that successor liability exists under the Coal Act as it relates to the sale of assets in these

bankruptcy estates.[9] First, the 1992 Plan concedes that if the individual assets of the Debtors' estates were sold piecemeal, no "reach forward" or successor liability would exist. Presumably, there is some point between the sale to a hundred different buyers and the sale to one entity, at which successor liability applies as argued by the 1992 Plan, although the 1992 Plan has not been able to articulate the same. By looking at the statute which created the liability, 26 U.S.C. § 9712, we cannot find at what point successor-in-interest liability is created. There is no question of the 1992 Plan's right to "reach back" under the provisions of the Coal Act, based upon existing case law interpreting such provisions. *See Carbon Fuel Co. v. USX Corp.*, 891 F.Supp. 1186 (S.D.W.Va. 1995). However, there is no case law and the statute gives no clear right for the 1992 Plan to "reach forward".

The legislation is clear that the 1992 Plan is empowered to reach back to the most recent former employer if the primary obligor is no longer able to pay premiums, but there is no similar provision in the 1992 Plan which authorizes this Court or the Social Security Administration to "reach forward" to successor-in-interests, despite the gratuitous language in the Coal Act that indicates successors may be *liable under some circumstances.* See 26 U.S.C. §§ 9701, 9711, and 9712. It seems from the language of the Coal Act that the inclusion of "successor in interest" and "successor" was to prevent non-arms length transactions or sales between related parties from extinguishing liability of a responsible operator. Nothing in the Coal Act that would indicate a sale of a debtor's property by a secured party at a foreclosure sale or the sale by a debtor in possession (or trustee) under § 363 is not free and clear of the claim that the 1992 Plan seeks to impose a against a buyer in these cases, if it can be

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[9] This Court notes that the 1992 Plan provides a "wish list" test of successor in its Supplemental Brief in Support of Objections to Sale Motion (p. 13-14), although the test is not supported upon any existing theory of successor liability, i.e. labor law, Black Lung Fund, tax law or any other appropriate test.

shown that the sale is (1) noticed and advertised to all parties as a sale free and clear of liens and other interests, (2) not to a related party, and (3) meets the good faith requirements of § 363.

Upon a finding that the term "any interest" as utilized in 11 U.S.C. § 363(f) includes the interests of the objecting parties in this proceeding, one of the five conditions under § 363(f), as quoted above, must be satisfied. The Court finds that the interests of the UMWA and the 1992 Plan fall under subsection (5) of § 363(f), which permits a sale free and clear of any interest if "such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." All of the claims asserted by the objecting parties may be compensable in a money satisfaction. In *In re WBO Partnership* at 107, the bankruptcy court found that it is a "hypothetical" satisfaction under (f)(5), since the subsection uses "could be" compelled and not "must be" or "shall be" compelled. For these reasons, the Debtors have satisfied the elements of 11 U.S.C. § 363(f) and this Court finds that the objections of the UMWA and the 1992 Plan should be overruled.

RECOMMENDATION TO DISTRICT COURT

If these recommendations are accepted, this Court shall enter an Order encompassing the findings as it relates to the Debtors' Motion as set forth in the March 13, 1996 hearing and contained in Exhibit B. For the reasons set forth herein, it is recommended that the District Court overrule the objections of the 1992 Plan and UMWA as the interests of these objecting parties are claims within these bankruptcy proceedings which may be sold free and clear of at a bankruptcy auction sale under § 363 of the Bankruptcy Code.

ENTERED: Mar. 29, 1996 /s/ Ronald G. Pearson
RONALD G. PEARSON
Judge

EXHIBIT A

John A. Rollins—counsel for Debtors

Susan Cannon-Ryan—counsel for UMWA 1992 Benefit Plan

Steven Thompson—counsel for Chicopee Coal

Marilyn Baker—counsel for UMWA Health and Retirement Fund

Christopher Clarke—counsel for UMWA Health and Retirement Fund

Thomas Vanderford—counsel for CIT

Michael Ramada—counsel for Genesis Equipment

Arthur M. Standish—counsel for United Coal

Mike Funk—counsel for United Coal

Tom Gilpin—counsel for Van-American Insurance, New Gauley Coal and Clarendon Insurance Co.

Richard Stephenson—counsel for WV Workers' Compensation, Unemployment

Jack Alsop—counsel for estate of Mr. Post

William F. Dobbs, Jr.—counsel for Westmoreland Coal, Caterpillar and Westvaco

James McHugh—counsel for Simmons-Rand

Michael T. Chaney—counsel for Ford Motor Credit

Michael Niggemyer—counsel for UMWA District 17

Randolph McGraw—counsel for UMWA District 17

Molly Kettler Wade—counsel for UMWA Employees

Robert Weinberger—Assistant U.S. Trustee

William E. Hamb—counsel for Georgia Pacific

Helen Morris—Chapter 7 Trustee for M&H Coal Company

EXHIBIT B

1. Due and proper notice of the hearing and the Debtors' Motion have been given in accordance with 11 U.S.C. § 363 and Rules 2002 and 6004 of the Rules of Bankruptcy Procedure as creditors and parties-in-interest have been provided more than the twenty (20) days notice as required by the Bankruptcy Rules;

2. The proposed procedure for the auction sale of the assets of the Debtors' bankruptcy estate is fair and commercially reasonable under the circumstances presented;

3. Good cause exists to authorize the Debtors to sell substantially all of the assets of their bankruptcy estates prior to the consideration of any disclosure statement and plan of reorganization and the auction sale has been advanced in good faith by the Debtors. Such cause includes the fact that rapid deterioration of the value of the Debtors' assets will occur over a short period of time and the costs necessary to maintain such assets are extensive to Debtors who have no income or financial resources with which to provide long term maintenance. Absent a prompt sale of assets, these bankruptcy estates will suffer irreparable harm;

4. The terms of sale requested by the Debtors were approved, except for the provision which allowed the Debtors to offer a percentage price reduction for bidders willing to assume certain liabilities of the United Mine Workers of America ("UMWA") and the United Mine Workers' Health and Retirement Funds ("UMWA Funds"). The Court found that such proposed reduction by the Debtors of the highest bid by 40% was arbitrary and not supported by any objective evidence. However, the Court shall consider and allow the parties desiring to bid in advance or at the auctio to designate any liability to be assumed in addition to their cash bids and in such a way to allow the market to determine the value of assuming any existing liability of the Debtors. In the event of multiple bids, the Debtors or other parties with

standing may address such matters to the Court at the hearing scheduled on April 23, 1996;

5. Equipment, as defined in the Interim Order entered March 27, 1996, sold at the auction shall be free and clear of any lien and interest upon completion of the auction. All other sales shall be deemed to be free and clear of interests only if the District Court overrules the objections of the 1992 Plan and UMWA. Such sales may include the assignment of leases and executory contracts of the Debtors provided that, at a sale confirmation hearing, the Court determines in the case of each asset(s) sold whether:

(a) The auction sale is to a good faith purchaser without any collusion or fraud; and

(b) The Lessor or other party to the lease or executory contract shall receive prompt cure of all defaults and has been provided adequate assurance of future performance of the applicable lease or contract to be assigned, to the of future performance of the applicable lease or contract to be assigned, to the extent required under the provision of 11 U.S.C. § 365(b) and (f). No provision of this Order, including determination of a sale free and clear of any interests, shall be deemed to determine or resolve what sums or other performance may be due by the Debtors or any assignee of a lease or executory contract or impliedly modify the terms of such contracts;

6. All sales to various purchasers of Equipment, as defined in the Interim Order entered March 27, 1996, at auction shall be authorized, free and clear of interests identified in the Debtors' Motion, pursuant to 11 U.S.C. § 363(f), due to the fact that all holders of such liens, claims or other interests either:

(i) could be compelled, in a legal or equitable proceeding, to accept money in satisfaction of their interests, within the meaning of Section 363(f)(5);

(ii) hold such interest subject to a bona fide dispute, within the meaning of Section 363(f)(4); or

(iii) hold an interest in the property that is a lien and the price at which the property is to be sold is higher than the aggregate value of all liens on such property within the meaning of Section 363(f)(3) or is disputed, and such lienholders are adequately protected in that they may bid at the auction sale and offset such bids by the amount of their claims;

7. Except as conditioned below, the sale of the Debtors' assets shall be a sale free and clear of all liens and interests identified below and all claims held by any creditor or party in interest in this case against the Debtors, their bankruptcy estates or the assets to be sold, existing as of the date of sale or which arise after closing of the sale but arise from, or are incurred in whole or in part by reason of the Debtors' ownership or operation of the property sold or calculated by reference to the Debtors or their assets or operation for a time period prior to closing. With the exception of liabilities specifically assumed in writing by a purchaser, at closing or by its assumption of the liabilities imposed by assignment of a lease, executory contract or permit assigned it, a purchaser of the Equipment or Real Estate, as the same are defined in the Interim Order entered March 27, 1997, at auction shall not, merely by reason of such purchase or the use of such assets, be liable for any such debts or liabilities of any of Debtors that may be otherwise assertable against such purchasers becoming a successor, successor in interest or by other operation of law under the terms of a statute, judicial doctrine, or other provision of law, subject to the limitations set forth herein. The claims which are not subject to being assumed by a purchaser absent an express assumption in writing, include the existing or future payment or obligation of any of the Debtors to pay:

(i) employee wages and benefits;

* * * *

Mine Health and Safety Act of 1969, as amended, or any other similar state or federal statute, including, without limitation, obligations to provide health benefits or to pay premiums for retirees, employees, former employees, or dependents of the foregoing or of any other person;

(iii) payments to any multi-employer pension or benefit fund, including, without any limitation, withdrawal liability;

(iv) claims for personal injury or property damage or other claims arising prior to the closing;

(v) taxes, assessments, premiums, and other sums due for events occurring prior to closing;

(vi) fees, penalties or other assessments of any nature incurred by any of the Debtors, including, without limitation, fines or penalties due to any outstanding notice of violation issued by any permitting or other governmental authority;

(vii) overriding royalties or sales commissions to any parties not specifically provided by the lease or executory contract assigned to such purchaser, and

(viii) any other liabilities or claims now existing against any of the Debtors not expressly assumed by any purchaser, whether contingent, absolute, liquidated or unliquidated, perfected or unperfected, including any sums due from cessation of Debtors' operations or dismissal of employees.

The Debtors' also propose to sell assets free and clear of the interests, as defined in this paragraph, of the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") and labor or collective bargaining agreements to which the Debtors are parties. The UMWA Funds and UMWA objections relate

to such proposal and are addressed herein in the recommended findings of fact and conclusions of law as to be submitted along with this Order to the District Court.

APPENDIX E

FILED December 30, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1708
CA-96-92-5

IN RE: LECKIE SMOKELESS COAL COMPANY;
NEW RIVER MINERAL RESOURCES COMPANY;
GOULD RESOURCES, INCORPORATED,
Debtors

UNITED MINE WORKERS OF AMERICA
1992 BENEFIT PLAN;
UNITED MINE WORKERS OF AMERICA
COMBINED BENEFIT FUND,
Movants-Appellants

v.

LECKIE SMOKELESS COAL COMPANY;
NEW RIVER MINERAL RESOURCES COMPANY;
GOULD RESOURCES, INCORPORATED;
ROYAL SCOT MINERALS, INCORPORATED,
Defendants-Appellees

and

UNSECURED CREDITORS COMMITTEE;
OFFICE OF THE UNITED STATES TRUSTEE,
Parties in Interest

No. 96-1739
MC-96-33-2

IN RE: LADY H COAL COMPANY, INCORPORATED;
CONSOLIDATED SEWELL, INCORPORATED;
SEWELL COAL COMPANY;
LEIVASY MINING CORPORATION;
EASTWOOD CONSTRUCTION, INCORPORATED,
Debtors

LADY H COAL COMPANY, INCORPORATED;
CONSOLIDATED SEWELL, INCORPORATED;
SEWELL COAL COMPANY;
LEIVASY MINING CORPORATION;
EASTWOOD CONSTRUCTION, INCORPORATED,
Debtor-Appellees

v.

UNITED MINE WORKERS OF AMERICA
1992 BENEFIT PLAN, and its Trustees,
Movant-Appellant

and

UNITED MINE WORKERS OF AMERICA
COMBINED BENEFIT FUND, and its Trustees,
Movant

and

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA;
DISTRICT 17, UNITED MINE WORKERS OF AMERICA,
Parties-in-interest

No. 96-1849
CA-96-92-5

IN RE: LECKIE SMOKELESS COAL COMPANY;
IN RE: NEW RIVER MINERAL RESOURCES COMPANY;
IN RE: GOULD RESOURCES, INCORPORATED,

Debtors

UNITED MINE WORKERS OF AMERICA
1992 BENEFIT PLAN, and its TRUSTEES;
UNITED MINE WORKERS OF AMERICA
COMBINED BENEFIT PLAN, and its Trustees,
Movants-Appellants

v.

LECKIE SMOKELESS COAL COMPANY;
NEW RIVER MINERAL RESOURCES COMPANY;
GOULD RESOURCES, INCORPORATED;
ROYAL SCOT MINERALS, INCORPORATED,
Defendants-Appellees

v.

UNSECURED CREDITORS COMMITTEE;
UNITED STATES TRUSTEE,
Parties in Interest

No. 96-1850
MC-96-33-2
BK-94-20449
BK-94-20765
BK-94-20766
BK-94-20767
BK-94-20710

IN RE: LADY H COAL COMPANY, INCORPORATED;
CONSOLIDATED SEWELL, INCORPORATED;
SEWELL COAL COMPANY;
LEIVASY MINING CORPORATION;
EASTWOOD CONSTRUCTION, INCORPORATED,
Debtors

LADY H COAL COMPANY, INCORPORATED;
CONSOLIDATED SEWELL, INCORPORATED;
LEIVASY MINING CORPORATION;
EASTWOOD CONSTRUCTION, INCORPORATED,
Debtor-Appellees

v.

UNITED MINE WORKERS OF AMERICA
1992 BENEFIT PLAN, and its Trustees,
Movant-Appellant

and

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA;
DISTRICT 17, UNITED MINE WORKERS OF AMERICA,
Parties in Interest

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The United Mine Workers of America 1992 Benefit Plan and the United Mine Workers of America Combined Benefit Fund's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX F

STATUTORY PROVISIONS

COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992

Subtitle C—Health Care of Coal Miners

§ 19141. Short Title.

This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992".

§ 19142. Findings and Declaration of Policy.

(a) Findings.—The Congress finds that—

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) Statement of policy.—It is the policy of this subtitle—

(1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

§ 19143. Coal Industry Health Benefits Program.

(a) In general.—The Internal Revenue Code of 1986 is amended by adding at the end the following new subtitle:

Subtitle J—Coal Industry Health Benefits

CHAPTER 99—COAL INDUSTRY HEALTH BENEFITS

Subchapter A—Definitions of General Applicability

§ 9701. Definitions of general applicability.

(a) Plans and funds.—For purposes of this chapter—

(1) UMWA Benefit Plan.

(A) In general.—The term "UMWA Benefit Plan" means a plan—

(i) which is described in section 404(c), or a continuation thereof; and

(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

(B) 1950 UMWA Benefit Plan.—The term "1950 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

(C) 1974 UMWA Benefit Plan.—The term "1974 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

(2) 1950 UMWA Pension Plan.—The term "1950 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired before 1976.

(3) 1974 UMWA Pension Plan.—The term "1974 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

(4) 1992 UMWA Benefit Plan.—The term "1992 UMWA Benefit Plan" means the plan referred to in section 9713A.

(5) Combined Fund.—The term "Combined Fund" means the United Mine Workers of America Combined Benefit Fund established under section 9702.

(b) Agreements.—For purposes of this section—

(1) Coal wage agreement.—The term "coal wage agreement" means—

(A) the National Bituminous Coal Wage Agreement, or

(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

(2) Settlors.—The term "settlors" means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the "BCOA").

(3) National Bituminous Coal Wage Agreement.—The term "National Bituminous Coal Wage Agreement" means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

(c) Terms relating to operator.—For purposes of this section—

(1) Signatory operator.—The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.

(2) Related persons.—

(A) In general.—A person shall be considered to be a related person to a signatory operator if that person is—

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clauses (i), (ii), or (iii).

(B) Time for determination.—The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

(3) 1988 agreement operator.—The term "1988 Agreement operator" means—

(A) a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

(4) Last signatory operator.—The term "last signatory operator" means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

(5) Assigned operator.—The term "assigned operator" means, with respect to an eligible beneficiary

defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

(6) Operators of dependent beneficiaries.—For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter, by reason of a relationship to the retiree.

(7) Business.—For purposes of this chapter, a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

(d) Enactment date.—For purposes of this chapter, the term "enactment date" means the date of the enactment of this chapter.

Subchapter B—Combined Benefit Fund

PART I. ESTABLISHMENT AND BENEFITS

§ 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.

(a) Establishment.—

(1) In general.— As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

(2) Merger of retiree benefit plans.—As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan

and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

(3) Treatment of plan.—The Combined Fund shall be—

(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

(4) Tax treatment.—For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

(b) Board of trustees.—

(1) In general.—For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

(C) two individuals designated by the United Mine Workers of America; and

(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

(2) Successor trustees.—Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees.

(3) Special rules.—

(A) BCOA.—If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

(B) Former signatories.—The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

(c) Plan year.—The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

§ 9703. Plan benefits.

(a) In general.—Each eligible beneficiary of the Combined Fund shall receive—

(1) health benefits described in subsection (b), and

(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

(b) Health benefits.—

(1) In general.—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

(2) Plan payment rates.—

(A) In general.—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits, and

(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

(B) Reductions.—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

(ii) by the amount reserved for plan administration under subsection (d).

(C) Increases.—The amount determined under subparagraph (A)(ii) shall be increased—

(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

(ii) by any carryover to the plan year from any preceding plan year which—

(I) is derived from amounts described in section 9704(e)(3)(B)(i), and

(II) the trustees elect to use to pay benefits for the current plan year, and

(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

(3) Qualified providers.—The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

(4) Effective date.—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

(c) Death benefits coverage.—

(1) In general.—The trustees of the Combined Fund shall provide death benefits coverage to each eligible

beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

(2) Termination of coverage.—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

(d) Reserves for administration.—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

(a) Limitation on enrollment.—The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

(f) Eligible beneficiary.—For purposes of this subchapter, the term "eligible beneficiary" means an individual who—

(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

PART II. FINANCING

§ 9704. Liability of assigned operators.

(a) Annual premiums.—Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

(1) the health benefit premium determined under subsection (b) for such plan year, plus

(2) the death benefit premium determined under subsection (c) for such plan year, plus

(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year. Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

(b) Health benefit premium.—For purposes of this chapter—

(1) In general.—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

(2) Per beneficiary premium.—The Commissioner of Social Security shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of—

(A) the amount determined by dividing—

(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year be-

ginning July 1, 1991, for all individuals covered under such plans for such plan year, by

(ii) the number of such individuals, plus

(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

(3) Adjustments for Medicare reductions.—If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

(c) Death benefit premium.—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

(d) Unassigned beneficiaries premium.—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

(e) Premium accounts adjustments.—

(1) Accounts.—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for

each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

(2) Allocations.—

(A) Administrative expenses.—Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

(B) Interest.—Interest shall be allocated to the account established for health benefit premiums.

(3) Shortfalls and surpluses.—

(A) In general.—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

(B) Exception.—Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to—

(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703 (b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

(C) No authority for increased payments. Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703(b)(2).

(f) Applicable percentage.—For purposes of this section—

(1) In general.—The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

(2) Annual adjustments.—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

(g) Payment of premiums.—

(1) In general.—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth

day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1995, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

(2) Deductibility.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

(h) Information.—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Commissioner of Social Security information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

(i) Transition rules.—

(1) 1988 agreement operators.—

(A) 1st year costs.—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

(B) Deficits from merged plans.—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

(C) Failure.—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

(D) Premium reductions.—

(i) 1st year payments.—In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1, 1993.

(ii) Deficit payments.—In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the "evergreen clause" found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

(iii) Limitation.—Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

(iv) Plan years.—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for

any succeeding plan year until such amounts are exhausted.

(E) Allocations of contributions and refunds.—Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

(2) 1st plan year.—In the case of the plan year of the Combined Fund beginning February 1, 1993—

(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

(3) Startup costs.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

§ 9705. Transfers.

(a) Transfer of Assets From 1950 UMWA Pension Plan.—

(1) In general.—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

(A) $70,000,000 on February 1, 1993,

(B) $70,000,000 on October 1, 1993, and

(C) $70,000,000 on October 1, 1994.

(2) Reservation.—Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

(3) Use of funds.—Amounts transferred to the Combined Fund under paragraph (1) shall—

(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) and the death benefit premium under section 9704(a)(2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

(4) Tax treatment, validity of transfers.—

(A) No deduction.—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA Pension Plan, the 1950

UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 UMWA Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

(B) Other tax provisions. Any transfer pursuant to paragraph (I)—

(i) shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA Pension Plan.

(5) Treatment of transfer.—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability, taxes, fines, or penalties of any kind whatsoever.

(b) Transfers from abandoned mine reclamation fund.—

(1) In general.—The Combined Fund shall include any amount transferred to the Fund under section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(h)).

(2) Use of funds.—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.

§ 9706. Assignments of eligible beneficiaries.

(a) In general.—For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

(b) Rules relating to employment and reassignment upon purchase. For purposes of subsection (a)—

(1) Aggregation rules.—

(A) Related person.—Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

(B) Certain employment disregarded.—Employment with—

(i) a person which is (and all related persons with respect to which are) no longer in business, or

(ii) a person during a period during which such person was not a signatory to a coal wage agreement,

shall not be taken into account.

(2) Reassignment upon purchase.—If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

(c) Identification of eligible beneficiaries.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Commissioner of Social Security a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

(d) Cooperation by other agencies and persons.—

(1) Co-operation.—The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Commissioner of Social Security in providing information which

will enable the Commissioner to carry out his responsibilities under this section.

(2) Providing of information.—

(A) In general.—Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Commissioner of Social Security in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Commissioner shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Commissioner, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Commissioner shall be so advised.

(B) Limitation.—Any information provided under subparagraph (A) shall be limited to information necessary for the Commissioner to carry out his duties under this section.

(3) Trustees.—The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Commissioner in furnishing, or assisting the Commissioner to obtain any information the Commissioner needs to carry out the Commissioner's responsibilities under this section.

(e) Notice by Commissioner.—

(1) Notice to fund.—The Commissioner of Social Security shall advise the trustees of the Combined Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

(2) Other notice.—The Commissioner of Social Security shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under the section and a brief summary of the facts related to the basis for such assignments.

(f) Reconsideration by Commissioner.—

(1) In general.—Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Commissioner of Social Security detailed information as to the work history of the beneficiary and the basis of the assignment.

(2) Review.—An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Commissioner of Social Security shall conduct such review if the Commissioner finds the operator provided evidence with the request constituting a prima facie case of error.

(3) Results of review.—

(A) Error.—If the Commissioner of Social Security determines under a review under paragraph (2) that an assignment was in error—

(i) the Commissioner shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall re-

duce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

(ii) the Commissioner shall review the beneficiary's record for reassignment under subsection (a).

(B) No error.—If the Commissioner of Social Security determines under a review conducted under paragraph (2) that no error occurred, the Commissioner shall notify the assigned operator.

(4) Determinations.—Any determination by the Commissioner of Social Security under paragraph (2) or (3) shall be final.

(5) Payment pending review.—An assigned operator shall pay the premiums under section 9704 pending review by the Commissioner of Social Security or by a court under this subsection.

(6) Private actions.—Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Commissioner.

(g) Confidentiality of information.—Any person to which information is provided by the Commissioner of Social Security under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

PART III. ENFORCEMENT

§ 9707. Failure to pay premium.

(a) General rule.—There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

(b) Amount of penalty.—The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day in the noncompliance period with respect to any such failure.

(c) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure to pay any premium or installment thereof, the period—

(1) beginning on the due date for such premium or installment, and

(2) ending on the date of payment of such premium or installment.

(d) Limitations on amount of penalty.—

(1) In general.—No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence, would have known, that such failure existed.

(2) Corrections.—No penalty shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B) such failure is corrected during the 30-day period beginning on the 1st date that any of the persons responsible for such failure knew, or

exercising reasonable diligence would have known, that such failure existed.

(3) Waiver.—In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary determines in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

(e) Liability for penalty.—The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a).

(f) Treatment.—For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

PART IV. OTHER PROVISIONS

§ 9708. Effect on pending claims or obligations.

All liability for contributions to the Combined Fund that arises on and after February 1, 1993, shall be determined exclusively under this chapter, including all liability for contributions to the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for coal production on and after February 1, 1993. However, nothing in this chapter is intended to have any effect on any claims or obligations arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims or obligations based on the "evergreen" clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of February 1, 1993.

Subchapter C. Health Benefits of Certain Miners

PART I. INDIVIDUAL EMPLOYER PLANS

§ 9711. Continued obligations of individual employer plans.

(a) Coverage of current recipients.—The last signatory operator of any individual who, as of February 1, 1993, is receiving retiree health benefits from an individual employer plan maintained pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individual and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for as long as the last signatory operator (and any related person) remains in business.

(b) Coverage of eligible recipients.—

(1) In general.—The last signatory operator of any individual who, as of February 1, 1993, is not receiving retiree health benefits under the individual employer plan maintained by the last signatory operator pursuant to a 1978 or subsequent coal wage agreement, but has met the age and service requirements for eligibility to receive benefits under such plan as of such date, shall, at such time as such individual becomes eligible to receive benefits under such plan, provide health benefits coverage to such individual and the individual's eligible beneficiaries which is described in paragraph (2). This paragraph shall not apply to any individual who retired from the coal industry after September 30, 1994, or any eligible beneficiary of such individual.

(2) Coverage.—Subject to the provisions of subsection (d), health benefits coverage is described in this paragraph if it is substantially the same as (and

subject to all the limitations of) the coverage provided by the individual employer plan as of January 1, 1992. Such coverage shall continue for as long as the last signatory operator (and any related person) remains in business.

(c) Joint and several liability of related persons.—Each related person of a last signatory operator to which subsection (a) or (b) applies shall be jointly and severally liable with the last signatory operator for the provision of health care coverage described in subsection (a) or (b).

(d) Managed care and cost containment.—The last signatory operator shall not be treated as failing to meet the requirements of subsection (a) or (b) if benefits are provided to eligible beneficiaries under managed care and cost containment rules and procedures described in section 9712(c) or agreed to by the last signatory operator and the United Mine Workers of America.

(e) Treatment of noncovered employees.—The existence, level, and duration of benefits provided to former employees of a last signatory operator (and their eligible beneficiaries) who are not otherwise covered by this chapter and who are (or were) covered by a coal wage agreement shall only be determined by, and shall be subject to, collective bargaining, lawful unilateral action, or other applicable law.

(f) Eligible beneficary.—For purposes of this section, the term "eligible beneficiary" means any individual who is eligible for health benefits under a plan described in subsection (a) or (b) by reason of the individual's relationship with the retiree described in such subsection (or to an individual who, based on service and employment history at the time of death, would have been so described but for such death).

(g) Rules applicable to this part and part II.—For purposes of this part and part II—

(1) Successor.—The term "last signatory operator" shall include a successor in interest of such operator.

(2) Reassignment upon purchase.—If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligibile beneficiary under this chapter. A last signatory operator shall notify the trustees of the 1992 UMWA Benefit Plan of any transfer described in this paragraph.

PART II. 1992 UMWA BENEFIT PLAN

§ 9712. Establishment and coverage of 1992 UMWA benefit plan.

(a) Creation of plan.—

(1) In general.—As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the 1992 UMWA Benefit Plan shall be treated as an organization exempt from taxation under section 501(a). The settlors shall be responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

(2) Treatment of plan.—The 1992 UMWA Benefit Plan shall be—

(A) a plan described in section 302(c)(5) of the Labor Management Relations Act. 1947 (29 U.S.C. 186(c)(5)),

(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002 (37)).

(b) Coverage requirement.—

(1) In general.—The 1992 UMWA Benefit Plan shall only provide health benefits coverage to any eligible beneficiary who is not eligible for benefits under the Combined Fund and shall not provide such coverage to any other individual.

(2) Eligible beneficiary.—For purposes of this section, the term "eligible beneficiary" means an individual who—

(A) but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or

(B) with respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,

and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992 UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal

industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

(c) Health benefits.—

(1) In general.—The 1992 UMWA Benefit Plan shall provide health care benefits coverage to each eligible beneficiary which is substantially the same as (and subject to all the limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

(2) Managed care.—The 1992 UMWA Benefit Plan shall develop managed care and cost containment rules which shall be applicable to the payment of benefits under this subsection. Application of such rules shall not cause the plan to be treated as failing to meet the requirements of this subsection. Such rules shall preserve freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. Major elements of such rules may include, but are not limited to, elements described in paragraph (3).

(3) Major elements of rules.—Elements described in this paragraph are—

(A) implementing formulary for drugs and subjecting the prescription program to a rigorous review of appropriate use,

(B) obtaining a unit price discount in exchange for patient volume and preferred provider status with the amount of the potential discount varying by geographic region,

(C) limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaries from balance billing by providers,

(D) utilizing, in the claims payment function "appropriateness of service" protocols under title XVIII of the Social Setcurity Act if more stringent,

(E) creating mandatory utilization review (UR) procedures, but placing the responsibility to follow such procedures on the physician or hospital, not the beneficiaries,

(F) selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network, and

(G) utilizing a managed care network provider system, as practiced in the health care industry, at the time medical services are needed (point-of-service) in order to receive maximum benefits available under this subsection.

(4) Last signatory operators.—The board of trustees of the 1992 UMWA Benefit Plan shall permit any last signatory operator required to maintain an individual employer plan under section 9711 to utilize the managed care and cost containment rules and programs developed under this subsection if the operator elects to do so.

(5) Standards of quality.—Any managed care system or cost containment adopted by the board of trustees of the 1992 UMWA Benefit Plan or by a last signatory operator may not be implemented unless it is approved by, and meets the standards of quality adopted by, a medical peer review panel, which has been established—

(A) by the settlors, or

(B) by the United Mine Workers of America and a last signatory operator or group of operators.

Standards of quality shall include accessibility to medical care, taking into account that accessibility requirements may differ depending on the nature of the medical need.

(d) Guarantee of benefits.—

(1) In general.—All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988 last signatory operator, on the basis of the number of eligible and potentially eligible beneficiaries attributable to each operator, shall include:

(A) the payment of an annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

(B) the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b)(2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

(C) the provision of security (in the form of a bond, letter of credit or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992 UMWA Benefit Plan shall require the operator to pay an annual prefunding premium that is greater than the premium otherwise applicable.

(2) Adjustments.—The 1992 UMWA Benefit Plan shall provide for—

(A) annual adjustments of the per beneficiary premium to cover changes in the cost of providing benefits to eligible beneficiaries, and

(B) adjustments as necessary to the annual prefunding premium to reflect changes in the cost of providing benefits to eligible beneficiaries for whom per beneficiary premiums are not paid.

(3) Additional liability.—Any last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium under paragraph (1)(B) for each eligible beneficiary described in such paragraph attributable to that operator.

(4) Joint and several liability.—A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

(5) Deductibility.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

(6) 1988 last signatory operator.—For purposes of this section, the term "1988 last signatory operator" means a last signatory operator which is a 1988 agreement operator.

Subchapter D. Other Provisions

§ 9721. Civil enforcement.

The provisions of section 4301 of the Employee Retirement Income Security Act of 1974 shall apply to any claim arising out of an obligation to pay any amount

required to be paid by this chapter in the same manner as any claim arising out of an obligation to pay withdrawal liability under subtitle E of title IV of such Act. For purposes of the preceding sentence, a signatory operator and related persons shall be treated in the same manner as employers.

§ 9722. Sham transactions.

If a principal purpose of any transaction is to evade or avoid liability under this chapter, this chapter shall be applied (and such liability shall be imposed) without regard to such transaction.

(b) Amendments to Surface Mining Act.—

(1) Extension of fee program.—Section 402(b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(b)) is amended by striking "September 30, 1995" and inserting "September 30, 2004."

(2) Transfer to fund.—Section 402 of such Act (30 U.S.C. 1232) is amended by adding at the end the following new subsection:

"(h) Transfer of funds to Combined Fund.—(1) In the case of any fiscal year beginning on or after October 1, 1995, with respect to which fees are required to be paid under this section, the Secretary shall, as of the beginning of such fiscal year and before any allocation under subsection (g), make the transfer provided in paragraph (2).

"(2) The Secretary shall transfer from the fund to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Revenue Code of 1986 for any fiscal year an amount equal to the sum of—

"(A) the amount of the interest which the Secretary estimates will be earned and paid to the Fund during the fiscal year, plus

"(B) the amount by which the amount described in subparagraph (A) is less than $70,000,000.

"(3)(A) The aggregate amount which may be transferred under paragraph (2) for any fiscal year shall not exceed the amount of expenditures which the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account under section 9704(e) of the Internal Revenue Code of 1986 for the fiscal year of the Combined Fund in which the transfer is made.

"(B) The aggregate amount which may be transferred under paragraph (2)(B) for all fiscal years shall not exceed an amount equivalent to all interest earned and paid to the fund after September 30, 1992, and before October 1, 1995.

"(4) If, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year."

(3) Conforming amendments.—(A) Section 401 (c) of such Act (30 U.S.C. 1231(c)) is amended by striking "and" at the end of paragraph (11), by redesignating paragraph (12) as paragraph (13), and by adding after paragraph (11) the following new paragraph:

"(12) for the purpose described in section 402 (h); and".

(B) Section 402(g)(1) of such Act (30 U.S.C. 1232(g)) is amended by striking "Moneys" and inserting "Except as provided in subsection (h), moneys".

BANKRUPTCY CODE PROVISIONS

11 U.S.C. § 363

CHAPTER 3—CASE ADMINISTRATION

SUBCHAPTER IV—ADMINISTRATIVE POWERS

§ 363. Use, sale, or lease of property.

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties to a security interest as provided in *section 552(b)* of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Anti-

trust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under *section 721, 1108, 1203, 1204,* or *1304* of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (c) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or

lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under *section 362(c), 362(d), 362(e),* or *362(f)* of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under *section 362*).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the inteersts of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and the expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of *section 365*, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among

potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

11 U.S.C. § 503

CHAPTER 5—CREDITORS, DEBTORS, AND THE ESTATE

SUBCHAPTER I—CREDITORS AND CLAIMS

§ 503. Allowance of administrative expenses.

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under *section 502(f)* of this title, including—

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax—

(i) incurred by the estate, except a tax of a kind specified in *section 507(a)(8)* of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

* * * *

CHAPTER 5—CREDITORS, DEBTORS, AND THE ESTATE

11 U.S.C. § 505

§ 505. Determination of tax liability.

(a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(2) The court may not so determine—

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; or

(B) any right of the estate to a tax refund, before the earlier of—

(i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or

(ii) a determination by such governmental unit of such request.

* * * *

11 U.S.C. § 507

CHAPTER 5—CREDITORS, DEBTORS, AND THE ESTATE

SUBCHAPTER I—CREDITORS AND CLAIMS

§ 507. Priorities.

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under *section 503(b)* of this title, and any fees and charges assisted against the estate under chapter 123 of title 28.

(2) Second, unsecured claims allowed under *section 502(f)* of this title.

(3) Third, allowed unsecured claims, but only to the extent of $4,000 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 [one] employee,

acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor;

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $4,000; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(5) Fifth, allowed unsecured claims of persons—

(A) engaged in the production or raising of grain, as defined in *section 557(b)* of this title, against a debtor who owns or operates a grain storage facility, as defined in section *557(b)* of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion,

and who is engaged in operating a fish produce storage or processing facility—

but only to the extent of $4,000 for each such individual.

(6) Sixth, allowed unsecured claims of individuals, to the extent of $1,800 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(7) Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt—

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in *section 523(a)(1)(B)* or *523(a)(1)(C)* of this title, not assessed before, but assessable, under applicable law or by agreement, after the commencement of the case:

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years im-

mediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository regulatory agency (or predecessor to such agency), to maintain the capital of an insured depository institution.

(b) If the trustee, under *section 362*, *363*, or *364* of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1)

of this section arising from the stay of action against such property under *section 362* of this title, from the use, sale, or lease of such property under *section 363* of this title, or from the granting of a lien under *section 364(d)* of this title, then such creditor's claim under such subsection shall have priority over every other claim under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

11 U.S.C. § 524

CHAPTER 5—CREDITORS, DEBTORS, AND THE ESTATE

SUBCHAPTER II—DEBTOR'S DUTIES AND BENEFITS

§ 524. Effect of discharge.

* * * *

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

* * * *

APPENDIX G

COAL COMMISSION REPORT

A Report to the Secretary of Labor
and
the American People

The Secretary of Labor's Advisory Commission on
United Mine Workers of America Retiree Health Benefits

November 1990
Washington, D.C.

COAL COMMISSION
200 Constitution Avenue, N.W.
Washington, D.C. 20210-0001

November 5, 1990
Honorable Elizabeth Dole
Secretary of Labor
Washington, D.C. 20210

Dear Madam Secretary:

The Coal Commission was created on March 12, 1990 "to focus on health care issues arising from the 1950 and 1974 UMWA Benefit Plans and the effects of resolving these issues on the coal industry as a whole." The Commission also was directed to advise you on:

1. The financial status and prospects of the United Mine Workers of America 1950 and 1974 Pension Trusts (Pension Plans) and 1950 and 1974 Benefit Trusts (Benefit Plans);
2. The provision and means of delivery of health care benefits to coal industry retirees and their dependents who either currently are or formerly were represented by the UMWA; and
3. Arrangements to assure long-term financial viability of the 1950 and 1974 Pension and Benefit Plans.

The Commission is pleased to forward to you its findings and recommendations on the finanicial status of the 1950 and 1974 UMWA Health and Retirement Funds and on the quality and availability of health care benefits for UMWA retirees.

In general, the Commission reached consensus on a wide range of issues aimed at ensuring the long-term financial stability of the Funds. These issues include imposition of a statutory obligation to contribute on current and past signatories to the National Bituminous Coal Wage Agree-

ment, mechanisms to prevent future dumping of retiree heath care liabilities, statutory authority to utilize excess pension assets, and the implementation of state-of-the-art managed care techniques. Of course, a number of factual, legal, financial and policy matters will have to be reviewed as these matters are resolved.

The principal substantive difference among members was on the question of who should provide financing for orphan retirees. Many Commission members believe that orphans represent an industry-wide problem that should be resolved on an industry-wide basis. Others believe that only current and past signatories should be required to finance orphan health care. Implicit in both views is that collective bargaining alone cannot resolve the problem of delivering promised benefits to retirees.

As Chairman, I commend you for the extraordinary people you selected to serve on the Commission. I could not ask for a better group of more highly qualified and truly dedicated public servants to work on the issues referred to the Commission. Each member, serving without remuneration, contributed enormous amounts of time and energy to the issues considered. Together, with an exceptionally strong staff, the members worked tirelessly to solve an extremely difficult and perplexing problem.

Many constructive and creative ideas were presented and discussed and some forceful arguments were offered in support of varying solutions. This report represents the very best consensus that could be achieved considering the strong views held by different Commission members on the numerous issues addressed.

On behalf of the Commission, I wish to thank those at the Department of Labor and the many others who helped the Commission accomplish its work. The Commission appreciates too your sincere interest and generous support in helping to solve this very difficult and complex health care problem confronting the coal industry.

Respectfuly yours,

/s/ W. J. Usery, Jr.
W. J. USERY, JR.
Chairman
Enclosure

Advisory Committee on
Mine Workers Retiree Health Benefits

EXECUTIVE SUMMARY

The UMWA Health and Retirement Funds (Funds) is a unique institution. It was created in the White House in a contract between the federal government and the UMWA and for 45 years, it has provided comprehensive health care benefits for retired miners and their families. Unfortunately, the combination of skyrocketing health care costs, an increasing number of retirees who have been abandoned by their employers, and a smaller percentage of coal producers making contributions to the UMWA Funds have put the health care program for retirees in a financial crisis.

In the last 10 years, the health care costs paid by the UMWA Health and Retirement Funds have doubled from $117.4 million to $245.3 million. By 1993, the Funds will have an estimated deficit of $300 million. Much of the cost is attributable to "orphaned" retirees whose companies have gone out of business or ceased paying for health care benefits. More than half of the Funds' population is composed of orphan retirees. How to continue to provide health benefits to "orphans" is the essence of the problem. Signatory coal operators who are still in the coal business are willing to pay the fair cost of their retirees, but are increasingly unwilling to shoulder the burden of paying for orphans, which they view as an industry-wide problem. Health care benefits are an emotional subject in the coal industry, not only because coal miners have been promised and guaranteed health care benefits for life, but also because coal miners in their labor contracts have traded lower pensions over the years for better health care benefits.

The current deficit for the Funds is $114.7 million, and the deficit will continue to grow at the current rate of contribution. A close analysis of the administration and operation of the Funds reveals that they are doing an adequate job in administering the Funds and in providing health care benefits for the retired coal miners. In short,

the growing deficit is much broader than the administration of the Funds.

There is consensus, that is, agreement among most of the Commission members, on a number of important issues. The Commission firmly believes that the retired miners are entitled to the health care benefits that were promised and guaranteed them and that such commitments must be honored. The Commission agrees that a statutory obligation to contribute to the plans should be imposed on current and former signatories to the National Bituminous Coal Wage Agreement. The Commission agrees that mechanisms must be enacted to prevent future dumping of retiree health care obligations on the Funds. The Commission supports statutory authority for the parties to utilize excess pension assets to reduce existing deficits. Finally, the Commission supports the implementation of managed care and cost containment activities designed to reduce costs without the loss of benefits.

The principal substantive point on which the Commission did not reach consensus is whether the entire industry should contribute to the resolution of the problem of orphan retirees. Many commissioners support the enactment of a small health care fee on current and former signatories, and other coal producers to help pay for health benefits of retirees who have no company to provide such benefits. Others believe that only current and former signatories should be required to contribute. As a result, two alternative approaches for a possible long-term solution are offered by the Commission. It is recognized there may be appropriate modifications to either of these solutions, and that other satisfactory plans could be developed.

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INTRODUCTION

A. *Creation of the Commission.* On March 12, 1990, Secretary of Labor Elizabeth Dole appointed an 11-member Commission to review and make recommendations concerning the financial crisis confronting the 1950

and 1974 UMWA (United Mine Workers of America) Benefit Funds. Secretary Dole appointed W.J. Usery, Jr. to serve as Chairman of the Advisory Commission on United Mine Workers of America (UMWA) Retiree Health Benefits (the Commission) and directed the Commission to present its findings and recommendations to her by October 11, 1990. On September 27, 1990, Secretary Dole extended the Commission's reporting date to October 17, 1990, to permit the public additional time to make presentations and submit materials to the Commission for consideration. On October 18, 1990, Secretary Dole extended the Commission's reporting date to October 31, 1990 to allow the Commission members time to submit written proposals and statements for inclusion in the final report. On November 1, 1990, Secretary Dole extended the Commission's reporting date to November 5, 1990 to allow additional time for preparation and submission of the Commission's final report.

B. *Statement of the Problem.* The medical care program for retired coal miners represents a unique history of cooperation and confrontation between the private sector and the government. The UMWA Health and Retirement Funds were created in an agreement between the federal government and the United Mine Workers of America during a period of government seizure of the mines. It was shaped by a federally-appointed commission charged with examining health care in America's coal fields. Over the years, it has been recognized by specific legislative treatment, reshaped by numerous court decisions and kept alive in times of peril by government intervention in the collective bargaining process.

Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored. But today those expectations and commitments are in jeopardy.

The Commission was asked to examine the problem and to recommend a solution for assuring that orphan retirees in the 1950 and 1974 Benefit Trusts will continue to receive promised medical care. To deal effectively with its charge, the Commission had to consider the unique nature of the Funds; the sharp decline in the contribution base supporting them; the rapidly escalating medical care costs; and the strong historical tie among the Funds, its beneficiaries and the collective bargaining relationship which has been in place for over 40 years. In short, the Commission was asked to reconcile the changing landscape of the coal industry with the legitimate demands of history.

The 1950 and 1974 Benefit Funds are in financial crisis for several reasons. First, the number of coal companies making contributions to the Funds has declined significantly. In 1950 the companies making contributions to the Funds accounted for 80 percent of the coal produced in the nation; by 1990 companies making contributions to the Funds acount for only 30 percent of national coal production. Second, the cost of providing health care to retired miners and their families has increased significantly from 1950 to 1990. In the last 10 years alone, the total cost of health care benefits paid by the Funds has doubled from $117.4 million to $245.3 million. Third, there has been a steady increase in the number of orphaned retirees whose employers have either gone out of business or no longer provide health care benefits. The combination of these factors has left the Funds, which were created to provide retired coal miners and their families with one of the finest health care programs in the nation, in financial crisis.

While the 1950 and 1974 UMWA Benefit Funds are inadequately funded, the 1950 UMWA Pension Fund is over funded by approximately $237 million, assuming the current plan actuaries assumptions are realized. This surplus of pension funds has prompted legislative pro-

posals (1) to transfer some of these excess assets to the Benefit Funds and (2) to require certain coal operators—who were, but who are now no longer contractually obligated to make contributions—to resume making contributions to the Benefit Funds.

The crisis created by the high cost of health care is not unique to the coal industry. It is a major problem in the United States and one that affects much of American industry. The need to provide quality health care for American workers is a national challenge and, according to Secretary Dole, this challenge affects the "entire work force and [America's] competitive edge in the world market." The high cost of health care is the main issue in 87 percent of the labor disputes and is an issue that will dominate the collective bargaining process in the years to come.

On January 1, 1990, the parties to the strike at the Pittston Coal Company reached a settlement in their 10-month-long labor dispute, and on February 19, 1990, a new four-and-a-half-year contract was ratified by members of the UMWA. The payment of health care benefits to retired and disabled miners and their families was a major issue in the strike and was responsible in large measure for the subsequent formation of this Commission.

The current deficit for the 1950 and 1974 UMWA Health Benefit Funds is $114.7 million. By 1993, the deficit for the 1950 and 1974 UMWA Health Benefit Funds is expected to be more than $300 million. Secretary Dole contends that in order "to avoid a [more] serious crisis [in the future]," a "long-term resolution is needed" to deal with the problem of accelerating health care costs in the coal industry. That crisis could come as early as 1993 when collective bargaining commences between the UMWA and members of the Bituminous Coal Operators' Association (BCOA) on a successor agreement to the expiring 1988 National Bituminous Coal Wage Agreement (NBCWA).

The federal courts also have been active in resolving disputes concerning the operation and contributions to the Funds. In addition, Congress has enacted legislation affecting the coal industry, most recently, the Clean Air Act, and has considered legislation authorizing the transfer of money from the 1950 Pension Fund to the 1950 Benefit Fund.

The escalating cost of providing adequate health care to coal miners and their families, particularly the increasing population of orphan retirees, cannot properly or fairly be solved by the parties through collective bargaining alone. The Secretary of Labor's creation of this Commission is evidence in itself that the issue facing the Funds is not one that lends itself to resolution through negotiation and mediation. The problem of the escalating cost of health care is a problem of potentially great magnitude which today is threatening to bankrupt the UMWA Health and Retirement Funds, and which tomorrow may threaten the financial solvency of union and nonunion coal mining companies alike. In short, at the present rate of inflation in health care costs, many companies over the longer term may not be able to provide health care coverage for their employees because the cost of health care may exceed the company's profits.

The time to deal with the problem is now before it becomes even more serious. If the coal industry and government can work together to solve this problem as it has worked together to solve problems in the past, the whole nation can benefit from the results. Not only will the coal industry remain healthy, but the nation too can benefit from the results achieved from the cooperative effort of the industry and the government.

C. *Charge of the Commission.* For these reasons, Secretary Dole created the Coal Commission and directed it "to focus on health care issues arising from the 1950 and 1974 UMWA Benefit Plans and the effects of resolving

these issues on the coal industry as a whole." In particular, she asked the Commission to advise her on:

1) The financial status and propects of the United Mine Workers of America 1950 and 1974 Pension Trusts (Pension Plans) and 1950 and 1974 Benefit Trusts (Benefit Plans);

2) The provision and means of delivery of health care benefits to coal industry retirees and their dependents who either currently are or formerly were represented by the UMWA; and

3) Arrangements to assure long-term financial viability of the 1950 and 1974 Pension and Benefit Plans.

The members appointed by Secretary Dole to serve on the Coal Commission have a wide range of experience and represent all facets of the coal industry. The union, coal operators—both BCOA and non-BCOA, the private insurance industry, as well as academics, actuarial, medical and government policy experts, and those with extensive experience in labor law, mediation and labor negotiations make up the membership. According to Deputy Secretary of Labor Roderick A. DeArment, who opened its first meeting, the Commission will have "free reign to explore any and all solutions" to the financial crisis confronting the 1950 and 1974 Benefit Funds.

D. *Work of the Commission.* In achieving the objectives set forth by the Secretary of Labor, the Commission reviewed the history of the trust funds and the types of health care benefits beneficiaries are entitled to receive. The members also reviewed the financial status of the health care and pension trust funds, and examined projected costs and expenditures for a 20-year period. In addition, the Commission analyzed how the health care trust funds are managed. Based on the information considered and examined, the Commission reached the

findings and conclusions set forth in the report and submit their recommendations for ensuring the integrity of retiree health benefits in the coal industry.

* * * *

CHAPTER TWO

HISTORY OF THE FUNDS [1]

A. *The Funds.* The Funds are unique. They were created by the federal government and the UMWA during a period of labor strife in the 1940s. Shortly thereafter, the Funds became an integral part of the first National Bituminous Coal Wage Agreement (NBCWA) at a time when the bargaining parties were faced with the challenge of saving the coal industry.

The original Fund was an experiment in the delivery of medical care and other benefits to coal miners. In the years that followed, the Funds became an essential part of the collective bargaining process. More recently, the rising costs of health care benefits has made the Funds and the health benefits they provide a major point of contention in the collective bargaining process. The Funds today represent the end result of over 40 years of historic evolution and efforts by the parties to fit a medical care system into a changing economic and labor relations environment.

B. *Historical Development.* The history of the Funds can be divided into five distinct periods:

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[1] The material on the History of the Health Care Benefits in the Bituminous Coal Industry was prepared and presented to the Coal Commission by Richard L. Trumka, International President of the United Mine Workers of America, and Joseph P. Brennan, President of the Bituminous Coal Operators' Association, Inc. Some Commission members do not believe that the government is responsible for the Funds' present financial crisis or that it is necessary for the government to be involved in resolving the present crisis.

- The *period of establishment* and its historical underpinnings, which saw two factors, the Union's desire for improved medical care for coal miners and labor-management strife, come together in 1946 to establish the Fund. The Fund's administration was fraught with problems and disagreements between the Union and Operator Trustees.
- The *period of development* stretching from 1950 to 1960, which saw the growth of the Funds and its medical care delivery philosophy and infrastructure that in many ways continues to dominate much of their operations.
- The *period of retrenchment,* during the decade of the 1960s, as economic reality came in conflict with institutional goals. During this period, many of the major initiatives of the earlier years were discarded, eligibility rules were scaled back and the Fund faced the possibility that its historic mission might not be achieved.
- The *period of transition* ran roughly through the 1970s. Employer involvement increased. The law demanded fundamental change, especially as it related to pensions; change that came to dominate the attention of the bargaining parties for much of the decade. The Funds moved from being the provider of medical care for all miners to essentially a program for certain retirees.
- The *period of crisis* covers the 1980s to the present. During the 1980s, the Pension Funds flourished, but the medical care program became increasingly contentious. During this same period, the contribution base declined even though national coal production increased substantially. In the 1980s, medical care costs also rose rapidly, even though cost containment was a major objective of the parties. The net result is that the Health Benefit Funds are now facing a financial crisis.

Four common factors run through the history of the UMWA Funds. Each of them separately and together have contributed to the evolution of the Funds. These factors are (1) government involvement; (2) the collective bargaining process; (3) the medical care delivery system; and (4) the industry.

1. *Period of Establishment.* The period of establishment covers the system of medical benefits in place before the Fund and the efforts made by the Union to establish it that culminated in the historic Krug-Lewis Agreement.

a. *Medical Care Delivery System.* Prior to the creation of the UMWA Welfare and Retirement Funds, medical care in coal field communities consisted of a prepaid system based on deductions from the miners' paychecks. Under this system the coal company deducted money from wages and hired doctors to provide medical services to the miners. In many cases this was necessary because the isolated, rural areas where coal was produced did not attract medical professionals and only the lure of a guaranteed income could induce doctors to set up practice in coal mining communities. Over time, the company doctor system developed in ways that the miners felt were not in their best interests.

Because of nationwide concern about health care matters during the Great Depression, President Roosevelt in 1935 appointed an Interdepartmental Committee to Coordinate Health and Welfare Activities. He named as chairman of the committee Josephine Roche, who later became the Neutral Trustee and Executive Director of the Fund. One of the major activities of the committee was to convene a National Health Conference, at which Dr. Walter Polakov, Director of the UMWA Department of Engineering, called for the establishment of "group medicine and group hospitalization" in coal mining communities.

Based on Dr. Polakov's presentation, the Union, through the Good Will Fund of Boston and the Twentieth Century Fund of New York, commissioned a report on medical conditions in the coal field communities by the Bureau of Cooperative Medicine. The study concluded that there was a pressing need for medical care reform in the coal fields.

b. *Government Involvement and Collective Bargaining.* With the end of the Second World War, Union negotiators renewed their efforts for medical care reform. When negotiations opened in 1945, the UMWA proposed a royalty of 10 cents per ton of coal to be paid to the Union to "provide for its members modern medical and surgical service, hospitalization, insurance, rehabilitation and economic protection." Although this was a new concept in America, a precedent existed in Great Britain where a welfare fund had been created in 1920, financed by royalties on coal production.

The operators rejected the participating royalty. The proposal ultimately was dropped when Secretary of Labor Frances Perkins entered the negotiations. She met with both sides and offered a compromise that did not include a royalty. The Union accepted the Secretary's compromise suggestion and dropped the medical care proposal until the next round of negotiations.

When the National Bituminous Wage Conference convened in 1946, a health and welfare fund for miners was the Union's top priority. The operators again rejected the proposal and the miners walked off the job on April 1, 1946. Negotiations under the auspices of the U.S. Department of Labor continued sporadically through April. On May 10, 1946, President Truman summoned John L. Lewis and Charles O'Neill, chief spokesman for the northern operators, to the White House. The stalemate appeared to break when the White House announced an agreement in principle on a health and welfare fund.

Despite the announcement by the White House, the operators still would not agree to the creation of a fund. Another conference at the White House failed to forge an agreement and the negotiations again collapsed.

Faced with the prospect of a long strike, President Truman issued an Executive Order directing the Secretary of the Interior to take possession of all bituminous coal mines in the United States and to negotiate with the Union "appropriate changes in the terms and conditions of employment." Secretary of the Interior Julius Krug seized the mines the following day and ordered the miners back to work. The miners refused, and negotiations between the UMWA and the federal government continued, first at the Interior Department and then at the White House with President Truman participating in several conferences.

After a week of negotiations, the historic Krug-Lewis agreement was announced and the strike ended. It created a welfare and retirement fund to make payments to miners and their dependents and survivors in cases of sickness, permanent disability, death or retirement, and other welfare purposes determined by the Trustees. The fund was to be managed by three Trustees, one to be appointed by the federal government, one to be appointed by the UMWA, and the third chosen by the other two. Financing for the new fund was to derive from a royalty of 5 cents per ton of coal produced for use or sale.

The Krug-Lewis agreement also created a separate medical and hospital fund to be administered by Trustees appointed by the UMWA. The purpose of the fund was to provide for medical, hospital, and related services for the miners and their dependents.

The Krug-Lewis agreement also committed the federal government to undertake "a comprehensive survey and study of the hospital and medical facilities, medical treatment, sanitary, and housing conditions *in* coal mining

areas." The expressed purpose was to determine what improvements were necessary to bring the coal field communities into conformity with "recognized American standards." It was the first nationwide medical survey of an industry ever conducted by the United States government.

To conduct the study, the Secretary chose Rear Admiral Joel T. Boone of the United States Navy Medical Corps. Federal government medical specialists spent nearly a year in the various coal fields of the nation exploring the medical care system. Their report, "The Medical Survey of the Bituminous Coal Industry," found that, in coal field communities, "provisions for health range from excellent, on a par with America's most progressive communities, to very poor, their tolerance a disgrace to a nation to which the world looks for pattern and guidance." The survey team discovered that "three-fourths of the hospitals are inadequate with regard to one or more of the following: surgical rooms, delivery rooms, labor rooms, nurseries and x-ray facilities." The study concluded that "the present practice of medicine in the coal fields on a contract basis cannot be supported. They are synonymous with many abuses. They are undesirable and in many instances deplorable."

Thus, the Boone Report not only confirmed earlier reports of conditions in the coal mining communities, but also established a strong federal government interest in correcting long-standing inadequacies in medical care delivery. Perhaps most important, it provided a road map for the newly created UMWA Fund to begin the process of reform.

Shortly after the Boone Report was issued, the mines were returned to their private owners and a new National Bituminous Coal contract was executed. It combined the pension and medical programs and increased the royalties to 10 cents per ton of coal. Thus began a two-year struggle over activation of the pension program. While the

level of the pension benefit and various eligibility issues were in dispute, there was also a major disagreement over whether the Fund should be on a pay-as-you-go or a pre-funded basis. After seven months of stalemate, the Neutral Trustee resigned in frustration.

The failure to agree on pensions caused miners to walk out of the mines in March 1948. Recognizing the intractability of the situation, the Speaker of the U.S. House of Representatives, Joseph Martin, asked the Trustees to meet with him on April 10, 1948. At the meeting in the Capitol, Speaker Martin suggested Senator Styles Bridges of New Hampshire as a neutral Trustee. Both Trustees agreed to the Speaker's suggestion. Senator Bridges pointed out the delay of almost two years since the Krug-Lewis agreement. He proposed to set the retirement age at 62 with 20 years of service and retirement subsequent to the Krug-Lewis agreement. By a vote of Lewis and Bridges the resolution was adopted and the deadlock was broken. Thus the Fund pension program was placed on a pay-as-you-go basis.

2. *Period of Development.* The 1950s saw a period of labor management cooperation and significant changes in the way coal was mined. During this period the Medical program of the Fund was fully developed.

a. *Collective Bargaining Process.* The development of the current medical care system is directly tied to the relationship between the parties. The 1950 Wage Agreement marked the beginning of a period of cooperation which had as its basic premise, a concordat between the UMWA and the coal industry that the Fund would move forward and operators would be able to mechanize their mines. A long period of relative labor-management peace ensued as both parties recognized that cooperation was essential to the long term viability of the coal industry.

b. *Medical Care Delivery System.* Ten regional offices were established throughout the coal fields, with the direc-

tion to make arrangements with local doctors and hospitals for the provision of "the highest standard of medical service at the lowest possible cost."

One of the first programs initiated by the Fund was a rehabilitation program for severely disabled miners. Under this program, over 1,200 severely disabled miners were rehabilitated. The Fund searched the coal fields to locate the disabled miners and sent them to the finest rehabilitation centers in the United States. At those centers, disabled miners received the best treatment that modern medicine and surgery had to offer, including artificial limbs and extensive physical therapy to teach them how to walk again. After a period of physical restoration, the miners received occupational therapy so they could provide for their families.

The Fund also made great strides in improving overall medical care in coal mining communities, especially in Southern Appalachia. Recognizing the need for modern hospital and clinic facilities in the coal fields, the Fund constructed and operated ten hospitals in Kentucky, West Virginia and Virginia. The hospitals, known as Miners Memorial Hospitals, provided intern and residency programs and training for professional and practical nurses.

c. *Government Involvement.* Government involvement in the developmental phase of the Funds was evident in their programs. The doctors recruited to administer the medical care program were, for the most part, former officials of the U.S. Public Health Service. The program which they established, both with respect to delivery and scope of coverage, reflected the views of those seeking much greater government involvement and a restructuring of the health care delivery system.

In addition, the Fund was not a qualified trust under the Internal Revenue Code. As a result, Fund income beyond the level of administrative expenses was deemed taxable. Moreover, employer contributions were not de-

ductible. To correct this a special section was inserted in the Internal Revenue Code in 1954 that permitted the deduction of employer contributions to a trust fund established under circumscribed conditions, one of which was government sponsorship.

d. *Industry.* After World War II, railroads converted to diesel locomotives; the home heating market was all but lost; natural gas pipelines were constructed; and imported oil began to flow into the country, further eroding coal's markets. As a result, the amount of coal produced fell sharply and the number of miners working dropped drastically. In 1945, 383,000 mine workers produced nearly 578 million tons of coal. By 1960, it took only 169,400 miners to produce nearly 416 million tons of coal.

The economic situation caused two interconnected problems for the Fund and the Miners Memorial Hospitals. First, the sharp reduction in coal output caused financial problems as royalty income fell. Second, the loss of over 200,000 miners drastically reduced the potential number of Fund patients to utilize the services of the new hospitals. Thus, the hospitals had to rely on non-Fund beneficiary patients to meet economies of scale, placing them in direct, and often bitter, competition with other hospitals and local medical societies.

3. *Period of Retrenchment.* By the 1960s, the difficult economics of the coal industry forced the Fund to take actions to meet financial realities.

a. *Government Involvement and the Medical Delivery System.* The economic decline of the coal industry forced the Fund to sell the hospitals. Again, the federal government was to play an important role. The United Presbyterian Church approached the Fund with an offer to buy the hospitals, but the purchase was contingent on receiving federal funds from the U.S. Department of Commerce. Eventually, with the help of Assistant Secretary

of Labor Daniel Patrick Moynihan and the personal involvement of President Kennedy, federal funds were made available and the hospitals were sold. Although they were no longer owned and controlled by the Funds, they continued to serve miners and other residents of the coal field communities and contributed to a significant improvement in overall medical care.

b. *Collective Bargaining Process.* Collective bargaining in the beginning of this period saw a continuation of the cooperative efforts that began in 1950. The latter part of the decade, however, saw a resumption of tensions at the bargaining table as the industry began to revive.

In the coal fields there had been wildcat strikes as a result of the retrenchment actions by the Trustees, particularly, with respect to eligibility for a health card. For example, in 1960, the Trustees ruled that unemployed miners could only have health cards for one year and from 1962 to 1966 health cards were taken from the employees of companies with delinquent contributions. Both health and retirement benefits were paid from a single trust. Economic realities forced the Trustees to make decisions on the level of benefits. Health care benefits were paid first, retirement benefits were paid last and were not guaranteed. If coal production dropped and there was not enough money in the Fund to pay the "target level" retirement benefit, the amount of the retirement benefit was reduced. In slow times money was diverted from the retirement payments to pay for health care benefits.

c. *Industry.* Employment levels bottomed out at 124,500 working miners in 1969 as compared to the 415,600 in 1950. Toward the latter part of the decade, there was an unrecognized turn in the fortunes of coal because of the increasing demand by the utilities for energy. But such growth was not a straight line projection of the past. Western production was becoming significant, surface mining was growing, and the potential of coal was

attracting large sources of capital outside of the traditional coal industry.

d. *Government Involvement.* Congress and many state legislatures passed laws on prevention, treatment and compensation for Black Lung which would cost billions of dollars. Moreover, the designation of Black Lung as an occupational disease shifted the medical costs connected with the disease from the Fund to the Black Lung Trust or individual employers, although the cost impact would not be felt for years.

Coal mine health and safety concerns led to the passage of the Coal Mine Health and Safety Act of 1969.

4. *Period of Transition.* The decade of the 1970s was a period of change for the Funds, the coal industry, and the UMWA. It was characterized by the rapid growth of coal mining nationally, significant changes in health, safety and environmental regulations, and the entry into the work force of a new generation of coal miners. In addition, the Employee Retirement Income Security Act of 1974 (ERISA) became law, imposing significant costs and administrative burdens on the Funds.

a. *Collective Bargaining Process.* After the death of John L. Lewis in 1969, the Funds once again became a central bargaining issue between the parties. Benefit levels, particularly pensions, were looked upon by the new young work force as being low. Employers became more and more aware of the cost implications of the Fund and the role that it would play in future labor-management relations.

From the 1971 negotiations forward, there was heavy involvement by both settlors on all aspects of the Funds' operation. The parties monitored Fund administration through oversight of the Trustees and in setting benefit levels and eligibility criteria at the bargaining table. There were several reasons for the shift toward more settlor involvement.

First, the total cost of the programs increased as the number of beneficiaries grew and inflation became a constant.

Second, the legal terrain changed dramatically, especially with pensions, creating a permanent obligation where there was previously none. The intervention of the federal judiciary, especially in *Boyle v. Blankenship, Kiser v. Huge, etc.*, 329 F. Supp. 1089 (D.C.C. 1971), *aff'd* 511 F.2d 447 (D.C.C. 1975), overruled many of the eligibility and administrative actions by the Trustees and added nearly 19,000 retired miners to the Fund, many of whom spent a considerable amount of their work careers in nonunion mines. In addition, the new group of retired miners brought thousands of dependents eligible for health care with them.

And, third, the dramatic influx of new workers in the early 1970s suggested a review and a revamping of the pension and benefits programs to meet the needs of these younger workers.

In response to these forces, the 1974 Agreement restructured the Fund into four separate Trusts—two for pre-1976 retirees, the 1950 Pension and 1950 Benefit Plans, and two for post-1975 retirees and the active work force, the 1974 Pension and 1974 Benefit Plans. The new plans also established a negotiated plan of benefits removing Trustee discretion to set benefit levels and eligibility standards.

The enormous overhang of pension liability of the post-ERISA period mandated a close working relationship between the parties. The parties agreed on a rapid funding schedule for the 1950 Pension Plan, a schedule that resulted in full funding of that Plan in 1987. The newly created ongoing liability of the 1974 Plan was to be funded on an hourly contribution basis.

b. *Industry.* The decade of the 1970s saw a major turn around for the coal industry in terms of production, employment, and future potential. The impact on the

Funds was threefold: first, the new growth potential offered the prospect of financial stability after two decades of stagnation and decline; second, there was an influx of young coal miners with expectations considerably higher than their grandfathers; and, third, a whole generation of miners retired. This occurred at a time when pension and medical care costs began to escalate and contractual pension obligations became fixed by statute.

But the most compelling feature of the period was the decline in the relative national share of NBCWA tonnage. The coal industry was being altered in a major way. New investors came into the coal industry who often were not interested in old established relationships and were unwilling to participate in the Funds. The new mines in the west were highly productive and did not want to subsidize their low productivity competitors. If there was to be a relationship with the UMWA, they wanted it to be outside the national agreement.

In this environment, the NBCWA also came under sharp attack from the signatories, and more and more attention came to be focused on the health and retirement system. One of the mutual responses to this trend by the UMWA and the BCOA was to fund the pensions as rapidly as possible to make them immune from economic trends in the industry. This effort was successful.

c. *Medical Care Delivery System.* In the 1970s, sharply increasing costs focused concern on the Funds. During the term of the 1974 NBCWA, contributions were reallocated among the various trusts in an effort to maintain the benefit stream. But the Funds fell into serious financial difficulty, leading to the reduction of medical benefits and eventually a total cutoff during the strike at the expiration of the Agreement. This first ever reduction of medical benefits resulted in a massive unauthorized work stoppage during the summer of 1977.

d. *Government Involvement.* The 1971 negotiations took place during wage and price controls and the agree-

ment had to be approved by the government. Both sides worked together to win government approval because the 15 percent increase in labor costs exceeded the Government's wage guidelines. The government approved the 15 percent wage increase and the doubling of the contribution rate to 80 cents per ton. However, it did not agree to allow an increase in the price of coal to the consumer to pass through the increase in the contribution rate as agreed by the parties.

5. *Period of Crisis.* The strains of the 1974 Agreement were carried forward into the 1978 negotiations. The Funds, especially the Benefit Plans, have been a matter of concern to the parties ever since.

a. *Collective Bargaining and the Delivery System.* Both parties entered the negotiations in 1977 with definite ideas on health care issues. The BCOA proposed individual company health plans and the UMWA wanted a guarantee that health benefits would not be cut in the future. Failure to reach agreement on these and many other issues caused an 111-day contract strike. Once again the federal government was involved: the White House intervened in the dispute and negotiations were conducted in the Secretary of Labor's office.

Under the 1978 agreement the Funds ceased to provide medical benefits to all beneficiaries; responsibility for active miners and for post-1975 retirees shifted to the individual companies as part of a broad agreement that also restored and guaranteed the benefits and introduced the so-called "evergreen clause" or continuing contribution obligation into the Agreement. This clause is currently in litigation. The 1974 Benefit Trust remained as a Fund for retirees whose last employer had gone out of business. The meaning of this eligibility language is in dispute and also is in litigation.

For the Funds' beneficiaries the changes were far more basic. Beneficiaries had freedom of choice in selecting medical care providers, effectively ending the clinic system

and participating physicians and hospitals. A new program was established covering acute drug needs.

The Trustees, in addition to their role as administrators, were to act as arbitrators in the company health plans to ensure that active miners and retirees on company plans would receive the same level of benefits as those beneficiaries on the Funds' rolls. This arbitration arrangement has been sanctioned by the Department of Labor since it was put into place in 1979.

The disparity in the levels of productivity between bituminous and sub-bituminous western mines also led to a negotiated agreement between some western coal operators and the UMWA. Under the terms of the Western Coal Wage Agreement of 1978, western coal companies agreed to create company-based health care and retirement funds which provided benefits that were as good as or better than the benefits provided under UMWA Health and Retirement Funds. Retirees in the Funds from those companies became the liability of the western mine operators, who then were relieved from the obligation to make further contributions to the UMWA Health and Retirement Funds.

In the 1980s there has been a struggle for Fund survival. Contractually, the parties have focused on cost and quality control. In 1984, a specific commitment to jointly address costs was written into the agreement. The 1988 Agreement mandated that the Trustees develop and implement an industry wide fee schedule and continue other cost control programs such as: inpatient hospital pre-admission and length of stay reviews; case management and quality of care programs; an aggressive prescription drug program; and other initiatives that result in no loss or reduction of benefits to participants.

b. *Industry*. Overshadowing the delivery vehicle have been the cost implications and the labor relations impact of the Funds. By the early 1980s NBCWA tonnage had slipped to close to 40 percent of national production, down from the approximately 80 percent levels when the

Fund began. Today it has dropped to about 30 percent as the growth of non-NBCWA coal continued throughout the 1980s. Companies withdrew from BCOA and sought to individualize their bargaining relationship, often in an effort to end their financial obligations to the Funds.

c. *Role of Government.* As a result of the 1977-78 dispute, President Carter appointed a Presidential Coal Commission to examine the issues that had lead to the bitter strike, including "health, safety and living conditions in the Nation's coal fields." The Commission found that health care indeed had improved in the coal fields. "Conditions since the Boone Report have changed dramatically, largely because of the efforts of the miners and their Union—but also because of contributions by the Federal Government, State and coal companies." And the benefit of the Funds' program was not limited solely to the immediate beneficiaries. The Commission concluded that "both union and non-union miners have gained better health care from the systems developed for the UMWA."

In 1980, the Congress passed the Multi-Employer Pension Plan Amendments Act (MPPAA) to ERISA. The UMWA and the BCOA strongly supported the passage of MPPAA which embodied the concept of withdrawal liability. In the legislation which ultimately passed, there are special sections for the 1950 Pension Plan based upon its unique nature and the circumstances surrounding its inception.

In 1989, Senators Rockefeller, Heinz, Byrd and Specter introduced legislation to stabilize the funding base of the benefit funds. Included in this legislation was authority to transfer the over funded portion of the 1950 Pension Trust to the Benefit Trusts.

The impact of government upon the Funds has not been limited to the executive and legislative branches. Court decisions too have had major impacts, good and bad, upon the Funds and their solvency. Two are illustrative of the problems.

As noted, the court's decision in *Blankenship*, dealt with the issues of alleged mismanagement of the Fund's finances and arbitrary changes to eligibility standards. In *Blankenship*, Judge Gesell in 1971 ordered the removal of Union and Neutral Trustees and appointment of a new neutral trustee. He also ordered the appointment of an independent financial advisor and directed that investments be made only in the interest of participants and beneficiaries.

The *Royal/Nobel* line of cases is still pending before the Courts. Those decisions have added thousands of former miners to the 1974 Benefit Fund with significant financial costs. This matter represents a serious dispute between the parties.

The medical care delivery system that has evolved is as much a creature of government as it is of the collective bargaining process. There is a line running from the original Boone Report to the present system. In a way, the original Krug-Lewis agreement predisposed if not predetermined the system that evolved.

d. *Funds Today*. Today, the Funds remain a major purchaser of medical care, but the development of health care is now a much broader community effort with the coal industry being only one part of the system.

The Funds should be viewed as a microcosm of the broader national dilemma over retiree health care. This financial crisis not only has the potential to jeopardize necessary health care benefits for retirees, it also threatens the relationship between labor and management in the coal industry. The challenge is to find ways to cope with the present crisis in the medical care delivery system started by a collective bargaining agreement negotiated between the UMWA and the coal operators, with help from the Federal Government, four and one-half decades ago.[2]

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[2] *See* Appendix 3 for a history of the contribution levels from 1946 to the present.

CHAPTER THREE

COVERAGE OF THE FUNDS

A. *Coverage.*—As early as the 1950s the United Mine Workers of America and the major bituminous coal operators negotiated labor contracts that included employer contributions into a jointly administered central health care fund for active and disabled miners, retirees and dependents.

In 1974 the UMWA and the Bituminous Coal Operators' Association (BCOA), representing major coal producers, agreed to the establishment of two separate health benefit funds to be administered by independent trustees. One (the 1950 Benefit Plan) would be a closed fund for miners and dependents who retired prior to 1976, while the second, the 1974 Health Benefit Plan, would cover health care for active and disabled miners, dependents, and those retiring after 1975. Each would be funded by employer contributions at levels established through collective bargaining. Obligations under the 1950 Benefit Plan would continue to be funded on tonnage-based contributions. Obligations under the 1974 Benefit Plan were to be funded on an hours-based formula.

In 1978 the UMWA and BCOA agreed that health care for active miners, future retirees and dependents would become the responsibility of single employers rather than the central funds. The level of benefits would remain the same but the operators would be free to set up individual plans for this coverage. The operators would continue to make contributions to the 1950 Benefit Plan at levels adequate to fund health care coverage for those miners who retired prior to 1976 and would provide individual health benefits for their active miners, their post-1975 retirees and dependents. The 1974 Benefit Plan would

be retained for the purpose of providing health care for those retirees and dependents whose last employer was "no longer in business."

Today, the UMWA Health and Retirement Funds are structured as follows:

1. *1950 Pension Plan.* The 1950 Pension Plan provides retirement benefits to miners who retired before December 31, 1975 and to those "who became disabled after May 28, 1946, and before December 6, 1974, as the result of a mine accident." [3] In addition, the 1950 Pension Plan provides retirement benefits to the widows and beneficiaries of retired or disabled UMWA coal miners who are eligible to receive retirement benefits under the 1950 Plan.

2. *1950 Benefit Plan.* The 1950 Benefit Plan provides health care benefits for "retired and disabled mine workers who receive pensions from the 1950 Pension Plan." [4] The 1950 Benefit Plan also provides health care benefits to the dependents of retired or disabled mine workers who receive retirement benefits from the 1950 Pension Plan. In addition, the 1950 Benefit Plan "provides health and death benefits to the eligible survivors of retired or disabled UMWA mine workers." [5] In some instances, the 1950 Benefit Plan also provides health care benefits for "disabled mine workers under the age of fifty-five who do not qualify for disability pensions but who will qualify for retirement pensions upon reaching the age of fifty-five." [6] The 1950 Pension Benefit Plan also provides for the payment of death benefits "to eligible surviving de-

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[3] Summary Plan Description. 1950 Pension Plan and Trust; 1950 Benefit Plan and Trust, United Mine Workers of America Health and Retirement Funds (undated).

[4] *Id.*

[5] *Id.*

[6] *Id.*

pendents of deceased pensioners or to the estates of deceased pensioners who are not survived by eligible dependents." [7]

3. *1974 Pension Plan.* The 1974 Pension Plan provides retirement benefits to UMWA coal miners who retire after December 31, 1975. The 1974 Pension Plan also provides retirement benefits to UMWA coal miners "who became disabled after December 5, 1974, as the result of a mine accident." [8] In addition, the 1974 Pension Plan provides retirement benefits to the widows and beneficiaries of retired or disabled coal miners who are eligible to receive retirement benefits under the 1974 Plan.

4. *1974 Benefit Plan.* The 1974 Benefit Plan provides health care and death benefits only to UMWA coal miners whose companies are no longer in business. The 1974 Benefit Plan also provides health care and death benefits to the dependents and the spouses of such miners.

B. *Comparison with Other Plans.* A comparison of the health care and retirement benefits received by UMWA members with those received by members of the United Auto Workers (UAW) and the United Steelworkers of America (USWA) reveals similarities and some differences.[9] On the whole, the health care benefits received by UMWA members are far more comprehensive than health care benefits received by UAW and USWA mem-

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[7] *Id.* at 3.

[8] Summary Plan Description, 1974 Pension Plan and Trust, United Mine Workers of America Health and Retirement Funds (undated).

[9] The data comparing the health care benefits received by members of the UMWA with the types of health care benefits received by members of the United Auto Workers and members of the United Steel Workers of America was prepared by Micheal Buckner, Research Director at the United Mine Workers of America, and Bruce C. Swan, Administrative Assistant to the Chairman, Bethlehem Steel Corporation.

bers; nor does the UMWA plan require deduction or coinsurance. However, the retirement benefits received by UMWA members tend to be less than the retirement benefits received by UAW and USWA members. A detailed comparison of the health care benefits available under each plan is set forth in Figure 5.

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CHAPTER FOUR

FINANCIAL STATUS

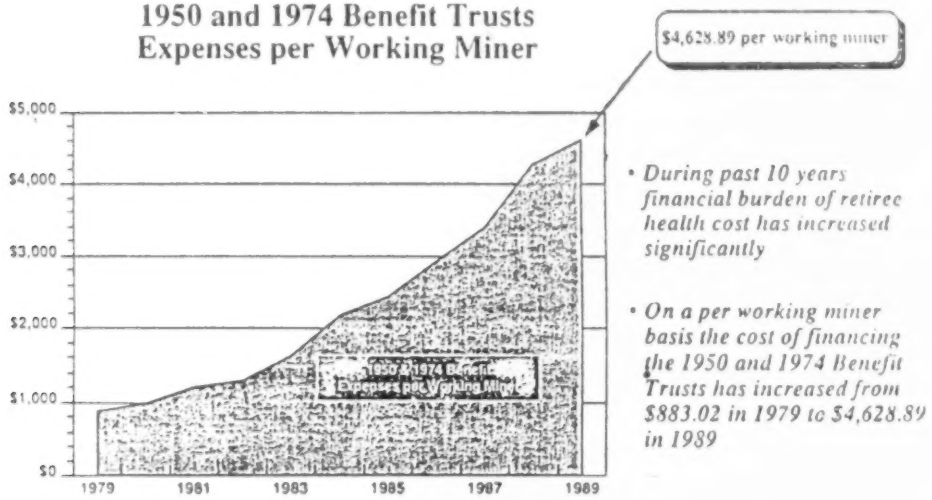
A. *Financial Status of the Trust Funds.* The current financial status of the UMWA Benefit Trusts is the result of the convergence of numerous forces both in the coal industry and in health care. Medical care inflation in the U.S. has been about double the overall rate of inflation. The coal industry has undergone significant changes in recent years, with precipitous declines in employment levels and substantial numbers of mine closings. The Funds have suffered shortfalls during the term of the current National Bituminous Coal Wage Agreement (NBCWA) due to insufficient contribution rates, a declining base of contributing companies and the addition of thousands of court-ordered "orphan" beneficiaries whose last employers are no longer operating or are no longer signatories to the current NBCWA.

The financial burden of retiree health costs has increased significantly during the 1980s. Over the past 10 years, the combined expenses of the 1950 and 1974 Benefit Trusts have more than doubled, increasing from $117.4 million in 1979 to $245.3 million in 1989. The annual cost of financing both health care plans, per-working miner, has increased from about $883 to $4,628. (Figure 6)

UMWA Benefit Trusts--Financial Status

CHART 2

1950 and 1974 Benefit Trusts
Expenses per Working Miner



(FIGURE 6)

At present each active miner supports 2.4 Funds' beneficiaries, while 10 years ago each miner supported only 1.6 beneficiaries. In addition, active miners support retirees and widows who receive medical care through single employer insurance plans.

The funding base for both Funds currently is declining faster than the beneficiary population. Over the past 20 years, coal production from mines signatory to the NBCWA contracts and contributing to the Funds has declined, while non-NBCWA mines have increased production. NBCWA mines today represent only about 30 percent of total coal industry production and new and tougher environmental regulations expected to go into effect in the near future pursuant to Clean Air Act amendments aimed at controlling acid rain could diminish the funding base even further.

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As of July 31, 1990, both Trust Funds showed a $114.7 million deficit despite the increased contributions from coal operators.[10]

The Funds have brought legal action against a number of employers that are not currently signatory but were signatory to the prior National Bituminous Coal Wage Agreements, seeking to enforce the obligation of those employers to continue to contribute to the Funds. The Funds also have sued the BCOA to increase the rate of contribution to the Trust in order to effectuate the guarantee of benefits contained in the collective bargaining agreement.

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[10] The Funds contend that the BCOA is required to establish further increases in contributions pursuant to the guarantee clause of the NBCWA of 1988.

CHAPTER FIVE

FINDINGS AND RECOMMENDATIONS

The solution to the health care crisis in the coal industry consists of two parts. The first part deals with liquidating the deficit and assuring the long-term solvency of the Funds. The second part deals with the implementation of cost containment measures to reduce the expense involved in providing health care benefits to retired miners and their families.

In arriving at its findings and recommendations, the Commission considered a number of analytical questions that are critical to resolving the long-term crisis of retiree health care in the coal industry. (See Appendix I.) Based upon its consideration of these and other questions, the information available, and the time permitted, the Commission arrived at a broad consensus, recognizing that further work will be required and that modifications may occur.

A. *CONSENSUS.*

First, and most broadly, the members of the Commission believe that the Commission's main objective is to find a long-term solution to the problem of delivering and financing health care in the coal industry. In addition, there is a consensus of the Commission, that is, agreement of most of the Commission members, on the following points:

1. *Contribution Obligations.* Contribution obligations should be statutorily imposed on past signatories, pursuing a test similar to the ERISA "control group" test, possibly reaching back to the signatory class of 1978.

2. *Withdrawal Liability.* Withdrawal liability should be imposed prospectively to prevent dumping, that is, shifting the liability for health care to employers who have no relationship with the employee.

3. *Transfer of Pension Surplus.* The surplus in the 1950 Pension Trust should be transferred in one of several ways to fund the deficits in the 1950 and 1974 Benefit Trusts, as part of an overall financing package.

4. *State-of-the-Art Cost Containment and Managed Care.* Any plan should use state-of-the-art cost containment and managed care measures as part of an overall package of health care delivery and financing, as described in Section D of this Chapter.

5. *Re-enrollment of Beneficiaries.* Comprehensive re-enrollment and certification of beneficiaries is appropriate to ensure that benefits are directed only to those entitled to receive them.

6. *Long-term Financing.* Any residual financing requirement must be limited to the smallest level practical. The contribution obligation that might be imposed on those with no contractual or historic connection to the Funds should be at the lowest practicable level: (1) after those with a contractual or historic connection have contributed; (2) after any pension surplus has been used appropriately, and (3) after managed care and cost containment measures outlined in Section D of this Chapter have been implemented.

7. *Flexibility in Determining Dimensions of the Contribution Base.* There should be flexibility and further consideration on exactly how any broadened contribution obligation might work. The assessments could be calculated based on hours worked, tons mined, and tons imported. Also, the rate need not be the same for all operators and for all coal. Variations based on BTU content may be appropriate, as well as variation based on past connection with the Funds.

8. *"Sunset" Provision on Financing Structure.* A "sunset" provision, which would re-evaluate the new delivery system and financing structure, would be appropriate after a period of time.

9. *Limited Applicability of Proposed Solutions.* These proposed solutions are not permanent solutions for the coal industry, nor are they intended for any other industry.

10. *Extension beyond 1993.* Any financing package must extend beyond 1993.

In short, the Commission has reached an understanding on a wide range of issues aimed at resolving the crisis of retiree health care in the coal industry. Most important of these are the imposition of a statutory obligation to contribute on current and past signatories, mechanisms to prevent future dumping of retiree health care obligations, authority to utilize excess pension assets and the implementation of state-of-the-art managed care and cost containment techniques.

While a broad consensus exists on these points, the Commission did not develop a consensus on the question of who should provide financing for orphan retirees. Many Commissioners believe that the orphans represent an industry-wide problem that should be resolved on an industry-wide basis. Others believe that only current and past signatories should be required to finance orphan health care. This represents the principal substantive disagreement among Commission members.

B. *FUNDING*

Because of the lack of consensus on the question of who should pay for orphans, the Commission has reviewed an industry-wide funding proposal and an alternative funding proposal. The Commission believes that both proposals, modified as may be appropriate, should be considered, along with any other funding arrangements that may be developed, to resolve the crisis in retiree health care in the coal industry.

1. *Industry-Wide Funding Plan*

The crisis of retiree health care in the coal industry derives from three related problems. First, some employers have sought to avoid, or are avoiding, their obligations to provide health care benefits to retirees and their families, foisting the cost of providing promised benefits on other employers. Second, an ever-growing population of orphan retirees is being supported by a shrinking group of employers and employees. And third, the cost of providing health care benefits to retirees has increased significantly. These problems must be resolved to obtain a long-term solution to retiree health care in the coal industry. This proposal will achieve that result.

I.

CONGRESS SHOULD AUTHORIZE THE CREATION OF A NEW ENTITY CALLED THE COAL INDUSTRY RETIREE BENEFIT FUND TO PROVIDE HEALTH CARE TO ORPHAN RETIREES.

This Fund, created by statute, would provide health care benefits to orphan retirees whose last employer (using an ERISA control group definition) is "out of business". This would include orphan beneficiaries currently in the UMWA 1950 and 1974 Benefit Funds and future orphans of employers—whether signatory or non-signatory to a collective bargaining agreement—tnat meet the "out of business" test. The Fund would be vested with rights to prevent dumping of obligations. The beneficiaries would receive the level of retiree health care benefits they were entitled to receive at the time of entry. The Fund would be financed by an industry fee which applies to all employers in the coal business, including a fee on imported coal.

II.

A NEW UMWA 1991 BENEFIT FUND SHOULD BE CREATED TO PROVIDE BENEFITS TO RETIREES OF CURRENT AND PAST SIGNATORIES OF THE NBCWA THAT REMAIN IN BUSINESS.

This Fund would provide health care benefits to retirees whose last employer (using an ERISA control group definition) remains in business. This would include beneficiaries of the 1950 and 1974 Benefit Funds whose last employer is signatory to the current NBCWA or was signatory to the NBCWA of 1978, 1981, or 1984. Congress would impose a statutory obligation on such employers to finance the cost of health care for its retirees who are placed in the 1991 Fund. Each employer will be required to pay a fair share into the Fund to provide benefits to its beneficiaries. Beneficiaries of the 1991 Fund will receive the same health care benefits they receive in the 1950 or 1974 Funds. To create greater purchasing power and economies of scale, employers may opt to provide benefits for active employees and individual company retirees under the 1974 Pension Plan through the 1991 Benefit Fund, upon proper payment to the Fund.

III.

CONGRESS SHOULD AUTHORIZE THE SETTLORS TO UTILIZE THE EXCESS ASSETS OF THE UMWA 1950 PENSION PLAN TO REDUCE EXISTING DEFICITS IN THE BENEFIT PLANS.

Historically, the UMWA Pension and Benefit Trusts have been considered a single entity for a number of purposes, including payments. There has been a "reallocation" option in the agreement since 1974 giving BCOA the right to divert contributions from the pension plan to the benefit plan when necessary. BCOA has, over the

years, either on its own or at the request of the UMWA, exercised this option many times, most recently immediately prior to the expiration of the 1984 NBCWA.

The 1950 Pension Trust is over funded by approximately $237 million. The obligations are covered by a dedicated bond portfolio which virtually guarantees the payment of benefits even in the event that there is no further signatory employment. Congress should authorize the settlors to utilize the excess pension assets to reduce the existing deficits in the 1950 and 1974 Benefit Funds.

IV.

CONGRESS SHOULD PROHIBIT THE DUMPING OF RETIREE HEALTH CARE OBLIGATIONS SO LONG AS THE EMPLOYER REMAINS IN BUSINESS AND HAS ASSETS TO PAY FOR SUCH OBLIGATIONS.

The ability of an employer to renege on commitments to its retirees and dump liability on the Funds disrupts any effective long range solution. Dumping liability is fatal to any multi-employer fund as it creates a clear incentive for employers to withdraw as quickly as possible. This disruptive potential is recognized clearly in the 1980 Multi-employer Pension Plan Amendments Act, and action under that statute has served to stabilize most pension funds including the two established under the NBCWA.

Unfortunately, there is no comparable anti-dumping structure in the health care area. The parties imposed substantial withdrawal liability on current signatories to the 1988 Agreement. However, thousands of beneficiaries whose last employers are non-signatory are a substantial burden on the Fund. More than half of current beneficiaries of the 1974 Trust are former employees or widows of companies still in the coal business or in other business ventures. The Commission believes that this situation is intolerable and must be stopped.

V.

CONGRESS SHOULD IMPOSE A STATUTORY OBLIGATION TO CONTRIBUTE ON SIGNATORIES TO THE NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1978 AND ANY SUCCESSOR AGREEMENT.

Throughout our deliberations, the responsibility of past signatories was a major concern. This subject has been a part of the collective bargaining dilemma that led to the founding of the Commission, is the topic of current litigation and provides an incentive for employers to leave the multi-employer plan.

This, when combined with the anti-dumping recommendation, is aimed at the stabilization of the contribution base and the prevention of a "last man's" club. The "evergreen" obligation has been a part of the agreement between the parties since 1978 and was designed to prevent massive withdrawals from the Funds. Because long and counter-productive delays can be expected in attempts to enforce this obligation through litigation, Congress should codify the continuing obligation to contribute clause to which current and former signatories agreed.

VI.

STATE-OF-THE-ART MANAGED CARE AND COST CONTAINMENT TECHNIQUES SHOULD BE IMPLEMENTED AS PART OF AN OVERALL SOLUTION TO THE RETIREE HEALTH CARE CRISIS.

The Commission discussed ways to improve the quality of health care and, at the same time, reduce the cost of health care. Proper use of managed care and cost containment can achieve these objectives without the loss or

reduction of benefits. Such techniques should be implemented in both the newly created funds. (Figure 10)

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2. *ALTERNATIVE FUNDING PLAN*

An alternative approach to the financing problem exists. It seeks objectives very similar to those of the industry-wide proposal. This approach has a different funding mechanism than the industry-wide proposal for making retiree health care for coal miners financially secure.

Specifically, any plan should meet the following needs:

a. Eliminate the current deficit of $83 million as of July 31, 1990;

b. Establish adequate financing to cover the 1950 and 1974 Benefit Funds claims and expenses through 1995 and beyond. With the expiration of the present labor contract in 1993, collective bargaining should become involved;

c. Ensure adequate provisions for additional revenues to provide for any future "orphan" beneficiaries;

d. Utilize current managed care techniques to enhance quality of care while reducing overall fund expenditures on a per capita basis; and

e. Continue health benefits to retirees and beneficiaries.

The major difference in this approach relates to its financing. Instead of imposing a new tax on all coal operators and establishing a new agency of the federal government, this plan seeks additional revenues from a broadened base of current and past signatories to the contracts, establishing and providing revenues for the Benefit Funds. Past obligations would be defined as those arising from firms

once signatory who may be identified through a chain of succession to a current operator.

Summarized below are the assumptions, financing arrangements and potential margins contained in the alternative financing proposal.

1. *Assumptions*

- Actual experience under the 1950 and 1974 Benefit Funds will be consistent with 10% trend projections, which includes assumption of 1,000 new orphans, annually, under the 1974 Fund. (See *Margins* below.)
- Actual experience under the 1950 and 1974 Pension Funds will be consistent with current actuarial assumptions.
- Managed care recommendations will be adopted as of January 1, 1991.
- Medicare screens for physicians will be adopted as of January 1, 1991.
- Current beneficiaries will be subject to reenrollment during 1991.
- Legislation will be enacted prohibiting future "dumping" and providing for pension-type withdrawal liability provisions.
- Legislation will be enacted permitting transfer of surplus assets from the 1950 Pension Fund to the 1950 and 1974 Benefit Funds.
- Legislation will be enacted requiring past signatories to contribute to Benefit Funds on an equitable basis.

2. *Existing Defict.* The defict under the 1950 and 1974 Benefit Funds as of July 31, 1990 is about $83 million, after adjusting for the recent court injunctions

and the Medicare capitation agreement. The projected deficit as of January 1, 1991 is about $115 million. This will be eliminated by a transfer of $115 million from the 1950 Pension Fund.

3. *Financing For Calendar Years 1991 and 1992*

   a. The current hourly contribution rate of $2.17 for the 1950 Fund will be indexed by the Consumer Price Index (CPI) from April 1, 1989 to January 1, 1992, respectively.

      The 8-cent hourly contribution rate for the 1974 Fund will be increased to 10-cents effective January 1, 1991 and 12-cents effective January 1, 1992.

   b. Based on the above financing, the Funds will be short about $70 million each year. This will be provided for as follows:

      - A "reachback" to former signatories—this would result in revenues of about $30 million per year. (Revenues are somewhat uncertain as former signatories could object, claiming they bargained out of the agreement in good faith.)
      - An estimated $10 million reduction in benefit payments from the adoption of Medicare screens for physicians.
      - The balance is provided for by a per tonnage charge on signatory coal of 10 to 12-cents *or* the balance is provided for by an annual transfer of $30 million from the 1950 Pension Fund.

4. *Financing For Calendar Years 1992 through 1995*

   a. The 1992 hourly contribution rates would be further indexed, by CPI, to each January 1 of 1993, 1994 and 1995.

b. The estimated shortfall for each of these calendar years is about $100 million. This will be provided for as follows:

- The "reachback" will continue to provide about $30 million.
- The savings from Medicare screens will continue at about $10 million.
- The remainder of the pension surplus (about $160 million as of January 1, 1993) will provide about $55 million per year.*
- The balance of the required $100 million will come from a per tonnage charge on signatory coal of about 2-cents.*

5. *Possible Margins*

- No financial recognition of potential savings from the adoption of managed care provisions. These could result in savings of $10 million per year increasing with inflation.
- If there are no new "orphans" to the 1974 Fund (rather than 1,000 assumed in original projections) then there will be additional surplus of $8 million on January 1, 1993 and $45 million on January 1, 1996.
- If the court-ordered "orphans" were returned to their former employers then there could be additional surplus of up to $90 million on January 1, 1996.
- Actual savings from adoption of Medicare screens could be 5% to 6% rather than assumed 4%.

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* If $30 million pension surplus is used in years 1991 and 1992, then only $30 million a year will be available for years 1993 through 1995. Hence, per tonnage charge would be about 10 cents rather than 2-cents.

Also, $10 million will gradually increase with inflation up to about $12 to $15 million on January 1, 1996.

6. *Net Effects*

If actual experience is consistent with that assumed, including the indexing of employer contributions and the adoption of managed care provisions, then the total additional surplus on January 1, 1996 could amount to $125-$175 million.

7. *Other Possible Changes*

- Increase benefits for 1950 retirees by 3% on January 1, 1993. This will cost about $40 to $45 million and could be provided for from indicated margins.
- Increase the $5 co-payments for physicians' services and prescription drugs to $5.25 on January 1, 1991 and by 5% thereafter, with appropriate adjustments to annual maximums.

C. *COST CONTAINMENT MEASURES.*

The Coal Commission believes that cost containment represents a promising approach for reducing the overall cost of providing health care to UMWA retirees and their dependents.

The approach described preserves freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. The Funds, with the backing of the UMWA and the contributing employers, have provided the groundwork for additional managed care approaches. It is expected that the cost containment measures described would not substantially add to the administrative costs.

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CHAPTER SIX

STATEMENTS OF COMMISSIONERS

A. *Statement of Vice Chairman Henry H. Perritt.* I believe that the two concepts offered at the meeting of October 17, 1990 are extremely close in their major features, and that it would have been desirable to bridge the gap and have a single recommendation. I believe that the industry-wide proposal is the better of the two.

I do not attribute the views expressed in this statement to any other member of the Commission. They are my own, and are offered to fulfill my obligation as a member of the Commission to offer my best independent judgment about the best way to solve the problem given to us, rather than offering an approach that has been tailored to conform to external constraints imposed by others' perceptions of Administration policy.

The financing crisis for retiree health care results from the concentration of funding responsibilities for a generic industry problem on a shrinking fraction of the industry. Any voluntary contractual mechanism to make such funding obligations legally enforceable is doomed to failure because the remaining contributors have stronger and stronger incentives not to contribute voluntarily. For this reason alone, the usual collective bargaining approach under the general labor laws is not a feasible financing approach. Whatever the appropriate financing obligations are, they must be imposed by external law and made enforceable without regard to contract duration. Thus, the only question is who should be subject to the mandatory premiums.

The Administration and the Commission quite properly prefer private sector arrangements for financing and delivering health care. The coal industry is distinctive for being a sector in which a comprehensive private structure has existed for forty years to finance and deliver health

care benefits. This structure has been determined by the United States Courts of Appeals in two judicial circuits to guarantee lifetime health care benefits to persons already retired. An essential principle of private contract law is that legally operative expectations based on contracts be fulfilled. Otherwise private arrangements through contract cannot operate. That means that the commitments to the retirees must be honored.

The judicial branch of the government, however, through other judicial decisions and through delay in the litigation process, has undermined the key features of the present private arrangements. These judicial decisions allow employers to dump their retiree health benefit obligations on the existing health care funds, and to evade contribution obligations. The judicial decisions taken together say that the health benefits must be paid, while depriving the private sector of the means to pay for them. The equities here are not those of present signatories and the UMWA seeking to ensnare someone else in their private arrangements; the equitable realities are that the law has frustrated realization of a private arrangement to provide a safety net for people who have a vested right to retiree health care benefits.

A variety of other governmental policies reflected in labor law and interpretation of labor law have made it difficult for the United Mine Workers of America to maintain a sufficient organization base and contractual uniformity to secure an adequate financing base. Apart from the equities, the reality is that an historically comprehensive, innovative, and strong private arrangement for health care is falling apart. When the present system falls apart there will be instability, not only in the organized part of the industry but in the coal industry generally.

If health care delivery and financing cannot be reformed, the following scenario is conceivable. There

would be a cataclysmic breakup in multi-employer bargaining in 1992, accompanied by significant economic disruption. The large individual producers that dominate BCOA would withdraw, and would take the position that the evergreen and guarantee litigation frees them, upon contract expiration, from the obligation to pay for the Funds' deficits. Regardless of the legal merits of this position, litigating the merits would take years. The Funds, deprived of adequate contributions, would suspend, terminate, or cut back benefits to retirees, producing strike activity that might be difficult or impossible for the UMWA to control. History suggests that the strike activity would spread broadly throughout the coal industry.

In the end, someone is going to pay for retiree health care, and the amount required does not change with different definitions of the contributor population. There are only three possibilities: the retirees themselves, the taxpayer, the coal industry. The retirees cannot do it; they lack the resources. The present financing structure is falling apart, and the likelihood is that it will not exist after 1993.

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